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## IDEOLOGICALLY MOTIVATED OFFENSES AND THE POLITICAL OFFENSES EXCEPTION IN EXTRADITION —A PROPOSED JURIDICAL STANDARD FOR AN UNRULY PROBLEM

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### INTRODUCTION

THE EXTRAORDINARY technological advances of the last two decades have not only put men on the moon, but have given all men around the globe a greater sense of awareness of their common universe. There is seldom an item of news transcending local interest which is not available to the masses by the communications media of almost every country in the world. Considering that it takes a fraction of a second to flash a given news item across the globe and only hours to physically reach its extremities, there is a growing realization that all peoples of this world are in some way affected by their respective conduct.

A look at the events of the sixties augurs a new decade of rapid changes and even more daring challenges to established beliefs, values, structures and practices. The real significance of the attitudinal change of the sixties lies in a fundamentally humanistic out-

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look which has developed with respect to people's problems. The emerging concern over "change" in this last decade and in the forthcoming one is not so much concerned with its philosophy or its motives as with the means used and the methods contemplated, regardless of whether the "issue" is a limited social question or one involving international implications. It is indeed very arduous to deal with issues of legitimacy of change when confronted with the radicalism of such concepts as "creative destruction" and "negative oppression" which equally assume a premise of legitimacy.<sup>1</sup>

The development of the "war of liberation" which links the guerrilla-type warring effort to an internal social program of revolutionary change, has brought a new dimension to political activism, whether in an "oppressed" or "free" nation. Consequently, it leaves doubt about the significance and the extent of conduct deemed political. The term "political offense" is hopelessly undefinable when the laws are the product of an establishment against which a "war of liberation" must be waged. The relatively easy distinction made between "common crimes" and "political crimes" during the early part of this century is irrelevant in this decade. An era in which piracy of the air, symbolic bombing of public and private buildings, and the blatant rejection of almost all forms of public authority without any apparent link between the actual conduct of the perpetrator (what he is doing) and the aim sought to be achieved (the social or political condition to be changed) requires immediate attention to this unruly problem.

With respect to piracy of the air, otherwise referred to as "aircraft hijacking,"<sup>2</sup> article 11 of the 1963 Tokyo Convention (which became effective December 4, 1969) rejects the notion that it should be considered a political act receiving the benefit of the "political offense" exception to extradition, and instead considers it an international offense.<sup>3</sup> The growing number of planes which are forcibly

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1. See Stanmeyer, *The New Left and the Old Law*, 55 A.B.A.J. 319 (1969). Mr. Stanmeyer also correctly questions the precision of the term "ideological criminal," *id.* at 321 n.15. A more appropriate term is "ideologically motivated offender," as used throughout this article.

2. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695 (1969). The words "aircraft piracy" are used in the 1958 Geneva Convention on the High Seas, Art. 15 (1) (a) (b) (1962) 13 U.S.T. 2312, T.I.A.S. No. 5200 450 U.N.T.S. 82. See also 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 657-59 (1963).

3. Convention on Offenses and Certain Other Acts Committed on Board Air-

derouted leaves us with the problem that if we consider the intent of the abductor, a political characterization may be made and there will be no extradition, but if we are to consider the actual conduct, the crimes committed (kidnapping; theft of the plane and its goods; theft of the services of the crew; and unauthorized usage of the equipment) are of such a nature as to warrant extradition.

There have been in the last few years numerous incidents of air piracy<sup>4</sup> or forcible derouting of aircrafts (and countless unknown attempts), but in only a few cases has extradition ever been sought.<sup>5</sup> The United States, however, has never availed itself of this process in such cases, even with Cuba to which most aircraft are derouted and with which an extradition treaty is still in force.<sup>6</sup> The United States has never even asked Switzerland, which represents the United States in Havana, to present such a request in its behalf.

The issue with respect to most Havana bound "hijacking" is less cumbersome than those issues involving "operations" by the Popular Front for the Liberation of Palestine, a group within the Palestine Liberation Organization, which is definitely politically motivated,

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craft, T.I.A.S. 6768 (Dec. 1969). See 58 AM. J. INT'L L. 566, 569 (1964) and Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509 (1967). Evans, *supra* note 2, at 708, reports that the legal committee of ICAC, through its sub-committee on Unlawful Seizure of Aircraft, took the view that such conduct could be characterized as "political." The sub-committee's report may be found in 8 INT'L LEGAL MATERIALS 245 (1969). See also 13 WORLD PEACE THROUGH LAW CENTER, CONVENTION TO DETER AIRCRAFT HIJACKING (1969), which, however, does not go into the question of "political offense" and probably intends the issue to be superseded by the obligation to "extradite" what the proposed Convention labels an extraditable offense. The drafters overlooked that making "hijacking" an extraditable offense does not ipso facto eliminate the "political offense" exception which applies to extraditable offenses even though asylum may not be at issue. See *infra*, notes 29-36, and corresponding text.

4. See Evans, *supra* note 2, at 698.

5. Poland recently asked France to extradite two East Germans who derouted a Polish plane to West Berlin. *Le Monde*, October 29, 1969, at 3. The French authorities have denied extradition and the two escapees were convicted and sentenced to two years in prison. France is deemed to have jurisdiction because the aircraft landed in the French occupation zone of Berlin. In 1952, the Swiss Federal Tribunal denied extradition and granted asylum to Yugoslav citizens. *In Re Kaavic, Byelanovic and Assenijevic*, 1952 Int. L. Rep. 371. On the other hand, Cuba extradited a French citizen, Albert Cardon, to Mexico where he was tried and sentenced for forcefully derouting an aircraft (Pan-Am flight from Houston to Panama) after it had taken off from Mexico City en route to Guatemala City. The Cardon case was reported by the N.Y. Times, August 10, 1961, at 4, col. 1; August 15, at 11, col. 1 (late city ed.).

6. See Extradition Treaty with Cuba, 33 Stat. 2265 (1905).

but whose objectives are sometimes non-military targets. Whenever such "operations" are directed at Israeli interests outside Israel, or for that matter extend against Zionist interests outside Israel, and the object or target has no apparent military connection, can their members claim that their conduct is "political" even though it involves the commission of a common crime?<sup>7</sup> As the relationship between the crime committed and the social or political aim sought to be achieved is only remotely linked by the designs of the perpetrator and its proportionality fails to meet the test of logic or reason, should the political characterization still extend? Too often it will depend solely on politically oriented national interpretations and not on any sound juridical basis. Even in the countries where such a juridical inquiry is made, it is not the expression of an internationally recognized standard, as none has yet been accepted by the international community.

What is a political crime and how it will be evaluated in extradition proceedings is a question of serious importance for the preservation and maintenance of world public order. It is also necessary to show *how* the decision is reached in order to avoid abusive practices which may emerge to meet those new needs and which may unduly deprive the relator of minimum standards of due process of law. That the political offender becomes a hero if he succeeds and a criminal if he fails is almost a truism in today's politically divided world. It is a poor substitute, however, for a juridical standard and a sad commentary on the persisting state of international relations.

#### THE CONCEPTUAL FRAMEWORK OF EXTRADITION AS AN INTERNATIONAL PROCESS

International law in the twentieth century is entering a pronounced phase of changing structures which entail the broadening of its scope and application. The individual who had been alien to the scope of this discipline is acquiring a limited place therein. This is manifested by the recognition and proclamation of certain fundamental human rights and by the subjection of the individual to

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7. See TIME, January 5, 1970, at 27, col. 3 and 28, col. 1; N.Y. Times, July 1, 1968, at 16, col. 6; N.Y. Times, August 30, 1969, at 1, col. 8; Evans, *supra* note 2, at 698 n.14.

personal accountability before the world community. Relations between nation-states are ceasing to be a matter of limited interest and exclusive concern of the parties immediately involved, but are broadening to encompass some aspect of the world community's interests in the maintenance and preservation of world public order.<sup>8</sup> The impact of these factors on classical norms of extradition law and practice are causing a reevaluation of this institution's purposes and functions,<sup>9</sup> and, consequently, affecting the nature and application of the political offense exception thereto.

The classical definition of extradition refers to it as the process by which one state (the state of refuge or asylum) surrenders to another (the requesting state) an individual (the relator) accused or convicted in the requesting state of an offense for which the re-

8. See McDOUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1960) and McDOUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960). For a different approach, see Carlston, *World Order and International Law*, 20 J. L'EGAL ED. 127 (1967).

For the purposes of this paper, the following terms are defined thusly:

**IDEOLOGY:** Body of doctrine or thought based on values supporting a social or political movement, institution or class.

**VALUES:** The ideals to which a measure of regard, significance and importance is subjectively ascribed to by one who estimates the worth and quality of the said ideals.

**VALUE-JUDGMENT:** A preference, choice of a form of action or thought over another without a fixed evaluation but in reliance upon ideology and values.

**IDEOLOGICALLY MOTIVATED OFFENDER:** One who knowingly commits a violation of positive law, with the belief that it is warranted or justified by a higher order or superior values than those ascribed to the law which he violates. A person moved by ideology who has made a value-judgment that for him justifies such conduct.

**AUTHORITATIVE PROCESS:** A system by virtue of which there is power and ability to direct the actions of others in a desired manner without reasoned persuasion or choice.

**DECISION-MAKING PROCESS:** A system through which persons at varying levels, holding authority (ability to direct others) coordinate and produce a final result.

**ORDER:** The product of a system of action and interaction, having a value-oriented goal for the purpose of a value realization.

**WORLD PUBLIC ORDER:** Is "order" oriented to that which affects mankind and is brought into being by the collective action and interaction of all constitutive forces of the various world authoritative decision-making processes.

9. See BASSIOUNI, *International Extradition and World Public Order: A Conceptual Evaluation*, in *Aktuelle Probleme Der Internationalen Strafrecht*, (Oehler and Potz eds. 1970); Bassiouni, *Rapporto di sintesi*, in *PRE-CONGRESSO DI DIRITTO PENALE INTERNAZIONALE DI SIRACUSA* (Siracusano ed. 1969); and Wise, *Some Problems of Extradition*, 3-4 *REVUE INTERNATIONALE DE DROIT PENAL* 518 (1968), reprinted in 15 *WAYNE L. REV.* 709 (1968).

questing state is seeking to subject the relator to trial or punishment.<sup>10</sup>

A proposed conceptual framework for extradition according to this author should be based on five interlocking factors, which are: (1) the recognition of the "national interest" of the states who are parties to the extradition proceedings; (2) the existence of an international duty to preserve and maintain world public order; (3) the effective application of minimum standards of fairness and justice to the relator in the extradition process; (4) a collective duty on the part of all states to combat criminality; and (5) the balancing of these factors within the juridical framework of the "Rule of Law."<sup>11</sup>

The interrelationship of these five factors is based on the following rationale: (1) The existence of a duty to preserve and maintain world public order does not destroy national sovereignty. The interests of the world community can be considered within the scope of the "national interest" because this latter concept is founded on the notion that "national independence [is better served] within international interdependence."<sup>12</sup> (2) The enforcement of individual rights in extradition proceedings is not only a matter of humanitarian concern, but also a recognition that the individual is a party in interest vis-a-vis the respective states and the world community. Such recognition does not detract from a nation's sovereignty if for no other reason than that the individual is ultimately the bearer of the consequences of institutionalized conflicts and personally accountable before the world community for acts in violation of international law.

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10. See Bassiouni, *International Extradition in the American Practice and World Public*, 36 TENN. L. REV. 1 (1968); Bassiouni, *International Extradition: An American Experience and a Proposed Formula*, 3-4 REVUE INTERNATIONALE DE DROIT PENAL 494 (1968), reprinted in 15 WAYNE L. REV. 733 (1969); Bassiouni, *La Estradizione Internazionale: Riassunto della Prassi Americana Contemporanea, ed. uno schema di porposte per il sinnovanmente dell'istituto*, 10 RIVISTA DEL DIRITTO MATRIMONIALE E DELLO STATO DELLE PERSONE 418 (1968). A generally recognized definition which was proposed to the Freiburg International Colloquium on Extradition is to be found in 1-2 REVUE INTERNATIONALE DE DROIT PENAL at 362 (1966). For the Proceedings of the Freiburg Colloquium see 3-4 REVUE INTERNATIONALE DE DROIT PENAL 819 (1968). The definition accepted in America was stated in *Terlinden v. Ames*, 184 U.S. 270, at 289 (1902).

11. For the principal *aut dedere aut punire*, see Bassiouni, 36 TENN. L. REV. *supra* note 10, at 27. On an individual's rights, see Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964); KUTNER, *WORLD HABEAS CORPUS* (1962); SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* (1964); and DROST, *HUMAN RIGHTS AS LEGAL RIGHTS* (1951).

12. Bassiouni, 36 TENN. L. REV. *supra* note 10, at 4. See ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* (1953); VATTTEL'S *LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Scott ed. 1964).

(3) Mutual cooperation and assistance in penal matters reinforces the effectiveness of the municipal public order of all states and does not have to depend for its effectiveness on political compromises or denial of individual rights. (4) Adherence to the "Rule of Law" is the ultimate safeguard and guarantee for the survival of mankind. Such a framework lends credence to the merits of the process through which decisions are reached. Credibility in the process makes acceptance of its results more likely and thus greatly diminishes opportunities for conflict over the decisional outcome.

In our contemporary, politically factionalized world, it would be naive to believe that in balancing these five factors in this proposed concept of extradition all said factors are equal; some are "more equal" than others. The first of these factors, the nationally perceived interest of the state, will remain the foremost consideration. The second factor, concern for world public order, will be largely shaped by considerations ancillary to the first and, therefore, of lesser impact in the course of the authoritative decision-making process leading to the granting or denial of extradition. The third, concern for the individual, will remain the least considered factor in the overall balancing of the equities and interests involved, as weighted by today's politically value-oriented decisions of institutional authoritative processes.<sup>13</sup> The fourth, if it is ever considered, will be regarded as part of "national interest" and not as an international obligation arising under general principles of international law. With respect to the "Rule of Law" concept, it will most likely be received perfunctorily and given lip service adherence by the following of certain forms and formalities with little or no regard for its substance. Somehow, even this bleak picture may become encouraging if a breakthrough is accomplished through greater adherence to the "Rule of Law" when we consider that in the history of law, forms, formalities and essentially adjective law determined outcomes which shaped some of the most fundamental and substantive human rights.

#### EXTRADITION AND THE INDIVIDUAL IN INTERNATIONAL LAW<sup>14</sup>

Extradition is regarded throughout the world, with some variations

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13. See McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decisions*, 19 J. LEGAL ED. 253 (1967).

14. See, e.g. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (2d rev. ed. Tucker



in application but not in substance, as an institutional practice. Governments are the subjects of its regulation, while individuals are the objects of its outcome. The individual who is contemplated by extradition proceedings is not the *primary* party contemplated by extradition law and practice. Restrictions, limitations, or defenses which exist under extradition law are not, with a few exceptions, primarily designed for the benefit of the individual, but rather for the benefit of the states involved. While it is sustainable to argue that the individual is the beneficiary of the political exception to extradition, the fact that his right thereto is limited to the raising of the issue is indicative of the real center of interest.<sup>15</sup> The state of refuge has the sole discretion of recognizing or rejecting the relator's contention that his alleged conduct falls within the scope of the political offense exception to extradition, but it does so in accordance with its own self-serving standards.<sup>16</sup>

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1966); 2 O'CONNELL, *INTERNATIONAL LAW* (1965); Tucker, *Has the Individual Become the Subject of International Law?*, 34 U. CINC. L. REV. 341, 358 (1965), wherein he states: "As a result of the Charter of the United Nations—as well as of other changes in international law—the individual has acquired a status and stature which have transformed him from an object of international compassion to a subject of international right;" Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956); Lauterpacht, *The Subjects of the Law of Nations*, 63 LAW Q. REV. 438 (1947) and 64 LAW Q. REV. 97 (1948); Kelsen, *GENERAL THEORY OF LAW AND THE STATE* (1945); Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383 (1947); Eagleton, *Some Questions as to the Place of the Individual in the International Law of the Future*, 37 AM. J. INT'L L. 642 (1943); WILLIAMS, *ASPECTS OF MODERN INTERNATIONAL LAW* 84-88 (1939); JENCKS, *THE COMMON LAW OF MANKIND* 58 (1958). BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* (1958), states: "We may, assume that by international law we mean the body of principles which regulates the conduct of states in their relations with one another." *Id.* at 2. Cf. SCHELLE, *PRECIS DE DROIT DES GENS* Pt. I (1932); GUGGENHEIM, *TRAITE DE DROIT INTERNATIONAL PUBLIC* (1953); and ROSS, *A TEXTBOOK OF INTERNATIONAL LAW* 73 (1947). *Also compare* JESSUP, *TRANSNATIONAL LAW* 1-3 (1956), *with* CORBETT, *THE STUDY OF INTERNATIONAL LAW* 50 (1955); CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 10, 12 and 19 (1951); *and with* BISHOP, *CASES AND MATERIALS ON INTERNATIONAL LAW* (1962). *See also*, NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (rev. ed. 1954).

15. *See* Bassiouni, 36 TENN. L. REV., *supra* note 10, at 16-19.

16. *See* Evans, *Reflections upon the Political Offenses in International Practice*, 57 AM. J. INT'L L. 1 (1963); Karadzole v. Artukovic, 355 U.S. 393 (1958); Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956); Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952). *See also* TIME, March 15, 1968, at 27, for the account of the Czechoslovakian General Jan Sejna who defected to the United States after Dubcek's *coup*; and the N.Y. Times, Dec. 20, 1967, at 4, col. 4 for the case of Calvin C. Cobb, an American Negro who sought refuge in Tanzania and successfully fought his extradition on social-political grounds. The

To further emphasize the interstate nature of the concept of extradition, nowhere in extradition law and practice can the individual—the object of the proceedings—compel the demanding state or the state of refuge to adhere to internationally recognized principles of extradition law if the states wish not to recognize them or to circumvent or waive their application.<sup>17</sup> Many states, in fact, deny that asylum or extradition are subject-matters which fall within general principles of international law and, hence, that no international obligation exists other than the specific duties created by treaty or accepted through reciprocal practice. It must be noted, however, that “customs evidenced by the practice of nations” are one of the sources of international law and are, therefore, as binding upon those nations as are their treaty obligations. One can advance the proposition that treaties of extradition and practiced customs in extradition have developed certain principles which fall within “general principles of international law,”<sup>18</sup> and thus create binding obligations upon the nation-states to adhere to such principles. There is, however, no direct right conferred upon the individual by international extradition law which he can claim, let alone enforce, against either of the respective states involved; he is always dependent upon their good faith and benevolence.<sup>19</sup> The application and enforce-

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defense was rejected in the cases of *Jimenez v. Hixon*, 373 U.S. 914, *rehearing denied*, 379 U.S. 858 (1963); *Jimenez v. Aristeguieta*, 314 F.2d 649 (5th Cir. 1963); *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962).

17. See O'Higgins, *Unlawful Seizure and Irregular Extradition*, (1960) 36 Y.B. INT'L L. COMM'N 279 and *infra* notes 44-47.

18. Freidmann, *The Use of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963).

19. The only exception is under the European Court of Human Rights and the Commission on Human Rights which hears individual petitions and gives individuals standing to present claims against states. The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome, Nov. 4, 1950, 213 U.N.T.S. 221 and became effective September 3, 1953. Fifteen members of the Council of Europe ratified the Convention: Austria, Belgium, Cyprus, Denmark, West Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, and the United Kingdom. France and Switzerland have not yet ratified it. See, e.g., WEIL, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1963); ROBERTSON, *HUMAN RIGHTS IN EUROPE*; and STEIN & HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* (1967). Rene Cassin, 1969 Nobel Peace Prize Winner and architect of the Universal Declaration of Human Rights and Civil and Political Rights Covenant, founded, in 1969, a Human Rights Center in Strasbourg, France, to study the implementation of human rights. The Center's Secretary-General, Dr. K. Vasak, has been a main force in this direction within the Council of Europe. Also, Luis Kutner's efforts for the creation of a "World Habeas Corpus" should be noted. See Kutner, 41 U. DET. L.J. 525, *supra* note 11; and KUTNER, *WORLD HABEAS CORPUS* (1962).

ment of individual rights is considered a matter of municipal law even though it might involve certain aspects of human rights recognized and proclaimed by the world community. This problem arises from the fact that the individual is still not considered a "subject" of international law and, hence, no practical means for the implementation of his rights have been developed which would allow him to seek redress of wrongs against a given state shielded by the "Doctrine of Sovereignty."<sup>20</sup> Mutual failure by the respective states to follow their own treaty or other legal obligations will not even create a right under international law that the individual can raise against those states, except whenever municipal law allows him a specific right, the denial of which, however, will continue to be an internal matter. A mutual or consensual failure by the respective states to extradition proceedings to abide by a treaty obligation designed to inure to the relator's benefit may not even constitute a breach thereof, since the individual who bears its consequences is not a party to the treaty. However, lack of fairness or good faith by the parties in the application of rights which they have stipulated in favor of third parties, or conceded to individuals as parties beneficiary under the treaty, may be said to violate the principle of *Ex Acquo et Bono*, at least in this century, even though traditionalist scholars would oppose this conclusion.

Treaty rights created by the respective nation-states which contain a stipulation for the benefit of "the individual," are, to that extent, rights running in favor of the third party, even though "the individual" is neither a party to the treaty nor a fully recognized subject of international law.<sup>21</sup> A claim could be asserted that a state's failure

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20. See European Convention, *supra* note 19.

21. On the subject of treaty rights and interpretation of treaties, see McDOUGAL, LASSWELL AND CHENG, *WORLD PUBLIC ORDER AND TREATY INTERPRETATION* (1968). Professor Dehaussy of the University of Paris feels that individuals can claim "their" rights from "their" states through the principle of invoking the binding obligations and laws of the state against the state itself. See 1 *JURIS-CLASSEUR DE DROIT INTERNATIONAL* chs. 10 and 14 (1958). The basis for this principle of the common law, which subjects its parties to the duty of good faith, is found in 3 *BLACKSTONE'S COMMENTARIES* 163. For its recognition and application in international law, see 1 *WHITEMAN, DIGEST OF INTERNATIONAL LAW* 98 (1963). A corollary to that principle is the theory of *abus de droit*, or abuse of right, which is recognized in international law and prohibits states who are required and presumed to act in "good faith" from abusing their "rights." See, e.g., BIN-CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953).

to grant the relator those rights created for his benefit by treaty, or by general principles of international law regarding extradition, create implications of illegality, in addition to which in certain cases a moral stigma would attach to that nation. To eliminate opportunities for any possible loss of political face which could be used by other states not parties to the proceedings or by the states involved in the issue, most "rights" conferred upon or granted "the individual" in most extradition treaties are couched in terms which are vague and indefinite so as to insure against the certainty of their claim and assertion. This is particularly true in the provisions relating to the "political offense exception."<sup>22</sup>

This article will propose a set of juridical standards which would grant the individual the privilege of claiming a right to the defense of "political offense" as an exception to extradition with some measure of juridical certainty of enforcement under municipal law and international law. Such a right would only compel the nation-states involved to follow juridically defined standards under sanction of international law. This would inure to the benefit of both the relator and the respective states by shielding them from criticism, and, at the same time, it reduces chances for disruptions of world public order.

#### THE IDEOLOGICAL AND VALUE-ORIENTED CONTENT OF OFFENSES AND THE IDEOLOGICALLY MOTIVATED OFFENDER

From earliest recorded history, societies—regardless of their institutional form—have sought to protect their structures against enemies from within, as well as against those from without. Social institutions and political structures are said to express the collectivity's goals and values. Since some individuals differ in goals and values from those expressed by such social institutions and political structures, they may become enemies from within by translating their divergent views into certain forms of activism. Recorded history frequently indicates mere divergence of thought has been considered dangerous and destructive enough to warrant suppression.

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22. In order not to detract from the reader's continuity, a thorough examination of political offense clauses in American treaties may be found in *Appendix A* of this paper. See Evans, *The New Extradition Treaties of the United States*, 59 AM. J. INT'L L. 351 (1965).

To secure their institutions, societies have devised laws designed to punish those who in some proscribed manner seek to affect their existence or functions. Those laws may be designed to prevent change altogether or to prevent change by certain means. The fact that these laws were enacted to protect a given social interest presupposes that a value-judgment was made as to the social significance of what is sought to be preserved and protected. Paradoxically, the violators of these laws are committed to changing the protected *status quo* and thereby do not consider their conduct blameworthy; if anything, almost always the converse is true. In fact, the ideologically motivated offender is one who denies the legitimacy of the law he violates and claims adherence to a superior legitimating principle.

Laws are the product of basic human drives and embody the values which are manifested by these drives.<sup>23</sup> The enactment of laws designed to secure political and social institutions is predicated on the values ascribed to the preservation and maintenance of these very structures. This presupposes the balancing of two value-rated, coexisting factors: (1) a social interest sought to be preserved; and (2) a social harm sought to be prevented. The use of legal sanctions to achieve these ends assumes that those it will seek to deter share to some extent the values embodied in that which is sought to be preserved. If such is not the case, as it may well not be, then *vengeance* and not *deterrence* becomes the object of the legal sanction—and so the harshest penalties are often enacted which express the conviction that there is little or no redeeming value in the offender; hence, death for treason has been the almost universal penalty, except where the penalty itself has been abolished.<sup>24</sup>

The relationship between the assumption that laws embody accepted values and the actual values of a society at a given time is a relative one. It is a relationship which is also contingent upon the flexibility and evolutionary characteristics of the very laws which are assumed to embody these values. The more static the laws remain while values undergo change, the more contingent that relation-

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23. See DAVITT, *The Basic Values in Law*, TRANS. AM. PHIL. SOC. Part 5 (1968).

24. See BASSIOUNI, *CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER* (1969); PACKER, *THE LIMITS OF CRIMINAL SANCTIONS* (1968); HART, *PUNISHMENT AND RESPONSIBILITY* (1968); and HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1947).

ship becomes and the less relevant will these laws be to the common morality embodied in the ordinary reasonable man concept. This concept of common morality is the foundation of self-regulation and social blameworthiness without which no laws could be effectively upheld and enforced by any organized society. The more repressive the society, the less significant this aspect of self-regulating common morality will appear to be. Conversely, the more liberal the society, the more it will have to depend for its ordered survival upon this concept.

Somehow through the history of mankind certain forms of human behavior have emerged which have invariably been characterized as offensive to the common morality of man. Hence, "common crimes" are those forms of behavior which affect an interest commonly and generally regarded by organized societies as violative of the accepted values of man, irrespective of political ideology or social structure. Murder is the most obvious example.

Beyond those commonly accepted values, other enacted legal mandates are predicated on a value-judgment reached by virtue of an ideologically oriented framework of values which do not enjoy that same common recognition. The context and meaning of such laws will therefore vary in time and place, and no uniform or permanent significance can be ascribed to them.

The "positivist doctrine of law" would see no basis for distinction as between violations of the law.<sup>25</sup> Yet, notwithstanding this position, the utilitarian basis of penal law would be seriously hampered because the motivating factor of the offender is the very ideological value sought to be preserved by the offense. The ideologically motivated offender is, therefore, one who (theoretically) cannot be deterred by the legal mandate he is transgressing.<sup>26</sup> This argument at least favors considering a qualitative distinction as to categories of violations of legal mandates.

An ideologically motivated offense is conduct actuated by values which are in conflict with those values represented by the law that is being violated. In fact, the violation proper becomes incidental to the competing and struggling ideological values. This meaning of the ideologically motivated offense encompasses, therefore, politi-

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25. HART, *supra* note 24.

26. BASSIOUNI, *supra* note 24, at 11-38.

cal offenses *stricto sensu* and is broader in scope and meaning than the latter because it is not limited to conduct directed solely against political institutions, but extends to social structures and their functions as well.

Even if one is to limit the inquiry to violations bearing directly upon strictly political institutions, excluding their supporting social structures, the inquiry into the values of the offender and those which were affected by his conduct is unavoidable. In this case, no degree of juridical certainty can be established since the only factor appearing herein is purely subjective. The attempt to find some standard of proportionality between the subjective goals and values of the perpetrator, that which he seeks to accomplish and the means used, only adds confusion to an already unruly problem. There is hardly a valid method of legal inquiry that can be predicated on such a *sui generis* standard. A subjective evaluation can only be made after an objective foundation is laid, and not vice versa, otherwise, it is no longer a "Rule of Law" that is formulated, but an *ad hoc* ruling of the individual judge, which destroys the certainty of the law.<sup>27</sup>

Ideologically value-oriented legal mandates, whose significance by their very nature fluctuate in time and are relative to a given societal framework, cannot rise to international significance. The only basis for such recognition is when the proscribed conduct is sanctioned by the common morality of mankind, as in the case of "international crimes" discussed below.<sup>28</sup> Only when a common level of values has permeated all peoples of the world can a truly international standard be applied in the case of such inquiries. In the absence of a common level of values, and with respect to such laws which have not reached this level, the only substitute is a uniform juridical standard offering judicial inquiry such as the one proposed below. This conclusion is inescapable if it is conceded that every ideologically motivated offense is an attack upon the law, but not every attack upon the law is to benefit from the characterization of "political offense" as an exception to extradition.

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27. For the principle *nulla poena sine legge* and certainty in penal laws, see BASSIOUNI, *supra* note 24, at 39-43.

28. See DONNEDIEU DE VABRES, *INTRODUCTION À L'ÉTUDE DU DROIT PENAL INTERNATIONAL* (1928) and DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* (1938).

THE RELATIONSHIP BETWEEN THE IDEOLOGICALLY MOTIVATED  
OFFENDER, ASYLUM, AND DENIAL OF EXTRADITION ON  
"POLITICAL OFFENSE" GROUNDS<sup>29</sup>

The ideologically motivated offender is one who strikes a blow to the most vital part of the requesting state's structure. The object of his conduct is the power structure complex, its institutional functions, and sometimes the very existence of the state. The offender's most likely refuge will be in that state which has the most interest in the outcome of that type of conduct. In fact, the offender is not likely to seek refuge in a state which, by reason of identical or similar political ideology or form of government, is likely to feel vicariously aggrieved by his conduct. In reality, the choice of a state of refuge made by the political offender will not be determined by the merits of his conduct, but by his evaluation of the political relations existing between the state wherein he committed his offense and the state wherein he would seek refuge.<sup>30</sup>

As asylum is granted, extradition is denied, even though the converse is not necessarily true. More often than not the decision to

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29. For a comparative evaluation and explanation of several national policies and laws, see Schultz, General Report on Question IV for 10th Int'l Law Penal Congress 3-4 REVUE INTERNATIONALE DE DROIT PENAL, *supra* note 10, at 785. For the relationship between the law of asylum, the political offense exception, and the penal policy of some foreign countries, see RONNING, DIPLOMATIC ASYLUM, LEGAL NORMS AND POLITICAL REALITY IN LATIN AMERICAN RELATIONS (1965); Rousseau, Preface to KOZIEBRODZKI, LE DROIT D'ASILE (1962); VIEIRA, DERECHO DE ASILO DIPLOMATICO (ASILO POLITICO). MONTEVIDEO, BIBLIOTECA DE PUBLICACIONES OFICIALES DE LA FACULTAD DE DERECHO CIENCIAS SOCIALES DE LA UNIVERSIDAD DE LA REPUBLICA (1961); LA FOREST, EXTRADITION TO AND FROM CANADA (1961); KIRCHHEIMER, GEGENWARTSPROBLEME DER ASYLEGEWAHRUNG (1959); GRÜTZNER, STAATSPOLITIK UND KRIMINAL-POLITIK IN AUSLIEFERUNGSRECHT ZIETSHRIFT FÜR DIE GESAUTE STRAFRECHTSWISSENSCHAFT, Tome 68 (1956); GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT (1956); GREENBURGH, *Recent Developments in the Law of Diplomatic Asylum*, 41 TRANS. GROTIUS SOC. 103 (1955); PAPA-THANASSIOU, L'EXTRADITION EN MATIERE POLITIQUE (1954); PLANAS-SUAREZ, EL ASILO DIPLOMATICO. ESTUDIO JURIDICO Y POLITICO SOBRE ESTE EXECRABLE USO LATINOAMERICANO DESTRUCTOR DE LA SOBERANIA NACIONAL Y DE LA CORDIALIDAD INTERNACIONAL (1953); QUINTANA, DERECHO DE ASILO (1952); Morgenstern, *Diplomatic Asylum*, 67 LAW Q. REV. 362 (1951); AFRICA, POLITICAL OFFENSES IN EXTRADITION (1927); Morgenstern, *The Right of Asylum*, [1949] 26 Y.B. INT'L L. COMM'N 327; Morgenstern, *Extraterritorial Asylum*, [1958] 25 Y.B. INT'L L. COMM'N 236; PIGGOTT, EXTRADITION, A TREATISE ON THE LAW RELATING TO FUGITIVE OFFENDERS (1910); Green, *Recent Practice in the Law of Extradition*, 6 CURRENT LEGAL PROBLEMS 287 (1953); Hambro, *New Trends in the Law of Extradition and Asylum*, 5 WEST. POL. Q. 11 (1952); McNair, *Extradition and Extraterritorial Asylum*, [1951] 28 Y.B. INT'L L. COMM'N 172.

30. See *supra* note 16 and note 29.



grant or deny extradition will have little to do with what the relator did or why he did it, but, in keeping with the classical concept of extradition, will depend on the political interest and convenience of the respective states. Thus, the national interest will become almost the exclusive consideration, disregarding any concern for the effect of the decision to grant or deny extradition on the maintenance and preservation of world public order and without regard for the individual's human rights or concern for his prosecution or punishment.<sup>31</sup>

An examination of the practice of asylum clearly reveals that the ideological and political proximity of the respective states is directly proportional to the likelihood that asylum will be denied. The more opposed they are ideologically and politically, the more likely the fugitive will find refuge or asylum therein.

It must be noted that a political offender is more intensely wanted by the state he has attacked than a common criminal whose wrong was not directed against the institutional existence or its structure and, therefore, it is less likely he will be fairly treated.

The basis traditionally advanced for granting asylum and denying extradition is concern for the individual. The theory of humane concern is predicated on two factors: (1) altruistic humanitarian considerations relating to the treatment to which the relator may be subjected upon his return;<sup>32</sup> and (2) a commitment in principle by the asylum state to the values of individual freedom. Both factors, while defensible in principle, must be labelled for what they are—value judgments by one political entity predicated on a political ideology deemed superior to that of another equally sovereign political entity. As stated by one authority:

Those who have fled religious, racial or political persecution and who may be

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31. See *supra* note 11.

32. It is significant to note that the rule of "noninquiry" prohibits the state of refuge from inquiring into the process of the requesting state as a consideration or factor in determining the extraditability of the offender. The United States adheres to this rule except when it relates to "political offenses." This is a troublesome question; if the American concern is truly humanitarian, it should be uniformly applied and not dependent upon the nature of the offense. See Bassiouni, 36 TENN. L. REV., *supra* note 10, at 21-25, and the cases cited, *infra* notes 79-85. It must further be noted that a doctrine of "specialty" exists which prohibits the requesting state from prosecuting the relator for any other offense than that for which he was extradited. All American treaties except those with Hungary and Ecuador have such a proviso. While such a doctrine inures to the benefit of the relator, it originated as a question of sovereignty. See Bassiouni, 36 TENN. L. REV., *supra* note 10, at 15-16.

described as political refugees . . . have found territorial asylum in the United States, not by right, for the United States does not recognize or subscribe to as a part of international law the so-called Doctrine of Asylum, but by grant of the government for humanitarian reasons, in recognition of the obligation of a free people toward the politically oppressed or for consideration of foreign policy.<sup>33</sup>

It is noteworthy that the *Universal Declaration of Human Rights* recognizes a right to asylum for non-political crimes.<sup>34</sup> This arises from a concern for refugees and stateless persons. Although it considers asylum for political crimes a commendable practice to be encouraged, it has not clearly made such asylum part of its recognized principles. However, political asylum for crimes of "thought" or crimes of "being" or for political persecution predicated on race, color, religion, or national origin does fall within the category of asylum by right enunciated by the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*.<sup>35</sup> Such is not the case for politically motivated crimes wherein the actor engages in some material conduct deemed violative of the laws of a given state. Hence, it will be necessary to distinguish situations so as to ascertain whether or not a right of asylum exists under international law and also whether the conduct of the relator falls within the treaty definition of a "political offense" exception to extradition, which would enable him to raise the question under the municipal laws of that state.

The first distinction to be made is between asylum in the sense of permission by one state to an individual to enter its territory or remain therein when such individual is not sought by another state, which involves only two parties, and asylum in the sense of allowing a person sought by a state to be shielded from its processes by a denial of extradition,<sup>36</sup> which involves three parties. Next, the granting of

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33. Evans, *supra* note 16, at 18. See Evans, *Observations of the Practice of Territorial Asylum in the United States*, 56 AM. J. INT'L L. 148 (1962); Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371 (1953); and Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247 (1933).

34. See The Universal Declaration of Human Rights, G. A. Res. 217, U.N. Doc. A/810 (1948); Article 14 of the Declaration in 43 AM. J. INT'L L. 127 (Supp. 1949); Lauterpacht, *The Universal Declaration of Human Rights*, [1948] Y.B. INT'L L. COMM'N 354; Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316 (1949).

35. *The International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at # 7g 6N. Doc. A/6316 (1966). For a discussion of "status criminality" in American criminal law, see BASSIOUNI, *supra* note 24, at 138-57.

36. See *supra* note 33.

asylum must be distinguished from the decision to refuse extradition. The state of refuge will decide the issue of extradition irrespective of and separate from the issue of allowing the relator to remain on its territory. The issue of extradition is decided on the basis of the treaty binding the two states or, in the absence of a treaty, on their customary reciprocal relations. The issue of asylum is considered a question of internal law, for it is deemed an immigration matter which is beyond the scope of the extradition question which may arise under international law.

In denying extradition, a state claims that the offense for which the relator is sought is not within the offenses specified in the treaty, or that it falls within the exception thereto; therefore, no obligation exists to exercise its jurisdictional power over the person of the relator and deliver him to the requesting state. Whether the state of refuge is concerned with the fate of the offender, desirous of upholding a national commitment to certain ideals and values, or simply furthering its own self-serving political interests, the consequence is that the relator will be shielded from the processes of the requesting state, and he will evade the consequences of his conduct altogether. Thus, to be concerned with the rights of the relator is tantamount to granting him impunity, which is to the detriment of at least two of the five factors outlined above: (1) world public order, by disruption of the political relations between the respective states; and (2) the duty to combat criminality, by lack of concern for the prosecution or punishability of a potential offender. Whether or not the state of refuge, in addition to denying extradition, will also grant asylum will be an *internal* decision based on national considerations.

The arguments offered in favor of granting asylum are usually humanitarian or strictly political. Both are, however, affected by two considerations: (1) a balancing of the extent to which granting asylum will affect political relations with the state whose extradition request was denied, the political worth of the refugee, and the degree of national commitment to the values involved in the refugee's conduct; and (2) the extent to which the refugee will present a domestic problem to municipal public order. While the first consideration is purely political and can only be subject to speculation, the second can be evaluated in the following manner: Assuming that the criminality of the refugee (political offender) is predicated and dependent upon

certain ideological conditions which brought about his violative conduct, then the removal of these conditions, or his removal from their environment, eliminates the basis of his criminality. In the absence of any other factors indicating a propensity to criminality, and if the political offender abstains from political activities against the nation from whose processes he was shielded, he will not represent a greater threat to the municipal public order of the asylum state than any other individual. This line of argument is further used to rationalize that denial of extradition for such an offender is not in derogation of the theory of mutual assistance and cooperation in combatting criminality, because the refugee does not fall within the contemplated category of common criminals for whom there is an international reciprocal interest in bringing to prosecution and punishment.

THE IDEOLOGICALLY AND POLITICALLY MOTIVATED OFFENDER, THE  
MORE WANTED OFFENDER, AND WORLD PUBLIC ORDER

The decision to seek extradition of a fugitive is arrived at by the executive, authoritative decision-makers of the requesting state. The decision to recognize or reject the requesting state's petition, either for political reasons or genuine juridical ones, lies with the executive, authoritative decision-maker's process of the state of refuge even though a judicial intervention may occur in the interim.<sup>37</sup> It is thus apparent that political collisions are likely, since the opposing parties are two distinct, executive, authoritative decision-making processes which are pitted without recourse against each other.

The manner in which extradition is denied or asylum granted can create a threat to world public order. Suppose that the relator's conduct was directed against the state itself, and that the state, whose authority, integrity, and indeed very "identity" may have been seriously threatened, is now being denied the right to bring the offender to trial. Any state is understandably concerned about the control of common crime within its borders, but the intensity of its concern is greater in those situations where the foundation of its internal political order has been shaken. Particularly in the case of espionage, the future security of the state may well be dangerously threatened. Diplomatic relations will undoubtedly be strained to the limit where

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37. For different *modus operandi*, see 3-4 REVUE INTERNATIONALE DE DROIT PENAL, *supra* note 10.

the offender has stolen plans or other secrets vital to the security and integrity of the demanding state. If the asylum state was also one of the instigators or beneficiaries of the illicit information-gathering activity of the fugitive, the result may be most threatening to the peaceful relations of the respective nations, and consequently, to world public order.

The internal political control of the demanding state may become an issue wherever a dictatorial faction is in power, since the failure to promptly apprehend and swiftly punish the offender may encourage other dissidents to acts of sabotage and revolt. The very power of the ruling class would be threatened by allowing the political offender to remain safely within the protection of the asylum state and would represent a moral challenge to the power structure of the demanding state.

Could such loss of face force a demanding state to threats or acts of aggression against the asylum state? It is not likely, of course, but the fact remains that the "political offense" exception to extradition may lead to a disruption of world public order because the contentious states are left with no other alternative to their exclusive, opposing, decision-making processes. No procedure exists which would remove the case from the contentious parties to an independent, international, adjudicatory process. Not even an internationally recognized standard of inquiry exists which would lend credence to the process of extradition, be it in its administrative or judicial phase, and which would result in the granting of asylum or denial of extradition.

Since World War II, the immigration laws of many states have been revised to provide for asylum of political refugees.<sup>38</sup> This has been done in the interest of protecting individuals from persecution in

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38. See Evans, *The Political Refugee in United States' Law and Practice*, 3 INT'L LAW. 205 (1969); Evans, 56 AM. J. INT'L L., *supra* note 33; De Vries and Novas, *Territorial Asylum in the Americas—Latin American Law and Practice of Extradition*, 5 INTER-AMERICAN L. REV. 61 (1963). Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253 (1965), provides that the political refugee who has been admitted into the country and is then found to be a deportable alien may request a temporary withholding of deportation on the plea that he would be subjected to persecution on account of race, religion, or political opinion in the country to which he is to be deported. Section 203(a)(7) added to the Act in 1965, 8 U.S.C. § 1153 (1965), provides for conditional entry of political refugees. The refugee is considered to be an excludable alien whose status can be adjusted to that of a permanent resident at the discretion of the Attorney General and subject to the approval of Congress.

the country from which they have fled. While the purpose is laudable, the situation may have been a factor in the "Cold War." Recognizing the validity and merits of national commitments to an ideological position and the laudable goals of humanitarian concern, the issue is not so much *whether* the fugitive should be granted asylum and his extradition denied on political offense grounds, but rather *who* he is and *how* it is done. Presently, a politically important fugitive of a state who seeks to be personally secure will seek refuge in a state which is "politically" adverse to the demanding state. Thus, the decision to request extradition by the demanding state, or that of its granting or denial by the asylum state, is invariably going to involve the whole spectrum of their political relations. The standard by which the relator's conduct will be evaluated and whether he will be extradited or granted asylum will therefore depend on the overall political relations between the states involved.<sup>39</sup> The fugitive is therefore in a position to pit one state against the other. Also, since the issue of his extraditability is left to the decision-making process of the asylum state (which decides in accordance to its own laws) there is no shelter for the asylum state, which is forced to elect between its political interest and its humane concern for the refugee,<sup>40</sup> which are possibly conflicting.

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39. *Appendix B* is a specially prepared chart which analyzes all the treaties between the United States and those countries with which the United States has extradition treaties. The reader will observe that the countries that are ideologically closest to the United States are those with which there exist the greatest number of treaties—and their type is usually significant. If the reader compares the "political offense exception" provision in American treaties listed in *Appendix A*, he will notice that treaty language is significantly different, while if one examines the practice it differs significantly with respect to certain countries. The key to interpreting these differences may be found in this cumulative treaty relations chart which warrants a special study beyond the scope of this article. Note also the signatories to the various multilateral extradition conventions, *infra* note 55.

40. The choice is often politically perilous. The Chicago Sun-Times, April 3, 1969, at 12, col. 3, reported:

*"Iran Breaks Ties with Lebanon"*

"Beirut, Lebanon—The government said Wednesday Iran broke off diplomatic relations with Lebanon Tuesday.

"Both countries withdrew their respective ambassadors March 22, over events relating to former Iranian security chief Gen. Taymour Bakhtiar.

"Iran wants Bakhtiar to face trial on charges of embezzlement and misuse of power when he was chief of security.

"Bakhtiar, a cousin of former Empress Soraya, is serving a one-year prison sentence here for arms smuggling. The Lebanese have refused twice to extradite him to Iran. Both times the Lebanese said they would not extradite him because it was against tradition to extradite political refugees."

See also *supra* notes 5 and 16.

In view of the precarious nature of this situation, the asylum state has to exercise the greatest discretion and caution when granting asylum and refusing extradition or vice versa. Thus, many states employ subterfuge to reach this desired result extra-legally, which is often to the detriment of the individual. This is usually done under the cover of immigration laws which are manipulated to fit the situation. The convenience of these practices depends on the fact that immigration questions are usually decided by an administrative authority which invariably has some measure of discretion. The executive authority of the state can therefore control the practice with some degree of certainty that little or no judicial review will occur. The object of all such devices is to keep the ultimate control of the situation in the hands of the political branch of the government. This is obviously not for the benefit of the individual, but to give the political branch leeway in meeting certain situations which might either prove politically embarrassing or, conversely, politically advantageous.

One way of allowing a refugee *de facto* asylum is by letting him enter on "parole." This legal fiction signifies that the alien is allowed physically in the country, but is not legally "admitted." If the alien proves to be a political liability, his "parole" is administratively revoked (as it was granted) and no legal issues arise. If the alien had been legally "admitted" as a visitor or resident, the question becomes slightly more difficult. As a visitor, he is a guest at sufferance; his visa can be revoked and he is usually asked to leave voluntarily. The period of such "voluntary departure" status can range from hours to days. A resident must have his residence revoked, and this usually allows some method of internal administrative or judicial review. To be rid of an alien is rather a simple matter in most countries.<sup>41</sup> These practices often become handy adjuncts in the hands

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41. An alien in the United States has some rights with respect to due process in exclusion cases. See *Chin Yow v. United States*, 208 U.S. 8 (1908), noted in 66 HARV. L. REV. 643, 661-76 (1953), 37 MINN. L. REV. 440 (1953), 20 U. CHI. L. REV. 547, 551 (1953), 62 YALE L.J. 1000 (1953).

In *Shaughnessy v. United States*, 345 U.S. 206 (1953), noted in 34 B. U. L. REV. 85 (1954), 67 HARV. L. REV. 99 (1954), 51 MICH. L. REV. 1231 (1953), 37 MINN. L. REV. 453 (1953), 33 NEB. L. REV. 94 (1953), 28 N.Y.U.L. REV. 1042 (1953), 26 ROCKY MT. L. REV. 192 (1954), and 27 SO. CAL. L. REV. 315 (1954), it was held that a twenty-five year resident who left the United States temporarily to visit his mother could, on his return, be excluded without a hearing and confined indefinitely on Ellis Island since no other state could be found to which he could

of states seeking to evade extradition proceedings, and they are labelled "disguised extradition."<sup>42</sup> If delivery of an alien is sought outside the framework of extradition, neighboring states can expel or deport the alien to their borders. If it so happens that the border is with the state which has expressed an "interest" in the individual, their agents will be at that border to seize him.<sup>43</sup>

That distance is no impediment to such schemes is demonstrated by the *Soblen* case, in which a fugitive was ordered deported because he had entered England without permission.<sup>44</sup> Dr. Soblen was accused of espionage in the United States. Released on bond, he fled to Israel claiming asylum and citizenship as a Jew under the Israeli law of return. Israel, under United States pressure, found that he did not qualify, and he was placed on an El Al flight bound for New York. Interestingly, there were no other passengers aboard except U.S. marshals. Close to England, Soblen attempted suicide; the plane landed, and he was taken to a hospital. The United States wanted Soblen, but the crime he was accused of was clearly a "political offense"—non-extraditable under the Anglo-American treaty of 1931.<sup>45</sup> England then found that Soblen had not been "legally admitted" and ordered his departure on the first available flight of the day, presumably to be returned to Israel. It so happened that there were no Israel-bound flights that day—only a Pan Am flight, to New York, upon which he was to be placed (instead, he died in an English hospital). In so doing, the legal process of extradition was to be evaded, while the result desired by the states involved would have been attained. Since this type of practice requires the connivance of the governments involved, another device is used when the state of refuge is reluctant to so cooperate—outright abduction or kidnapping

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be sent. For a state's responsibility toward aliens in international law, compare 4 MOORE, INTERNATIONAL LAW DIGEST 95 (1901), with 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 221 *et seq.* (1963). See also Guha-Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT'L L. 863 (1961); and Spiegel, *Origin and Development of Denial of Justice*, 32 AM. J. INT'L L. 63 (1938).

42. O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MOD. L. REV. 521 (1964).

43. The only American case known to this author wherein a border state refused to exercise jurisdiction over the person of an individual when jurisdiction was secured by force or fraud is *Dominquez v. State*, 90 Tex. Crim. 92, 234 S.W. 79 (1921).

44. See O'Higgins, *supra* note 42.

45. 47 Stat. 2122 (1933).



of the individual as with Eichmann and Tshombe.<sup>46</sup> This is made possible by the survival of the rule *mala captus bene detentus*, whereby courts will assert *in personam* jurisdiction without inquiring into the means through which the presence of the accused was secured.<sup>47</sup>

Consider that any of these strategies is extra-legal in form, substance, or both, but there is no deterrent to them if their consequences are allowed to produce legally valid results. Aside from the flagrant violation of the individual's right, such practices violate the lawfulness of international relations and subvert the international process. It clearly is an infringement of the concept of the "Rule of Law" and its consequences may range well beyond that. Consider the threat to the relations of the nations involved if abduction is the method of extradition as in the Eichmann and Tschombe examples, and consider the impact of such practices on world public order as they shake the already frail international balance and peaceful relations of interested states.<sup>48</sup> This is not to overlook the dangers of shielding an alleged political offender who may not fall within that category but who is politically valuable to the asylum state. This is all too often the case in luring defectors from other countries, usually ideologically and politically opposite and, thus, world tensions and threats to its public order are intensified under the often false premise of humanitarian concern.

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46. On the Eichmann case, see Cardozo, *When Extradition Fails is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961); Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L. J. 400; Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 TEMP. L. Q. 1 (1961). On the Tshombe case see International Commission of Jurists, Bulletin No. 32 at 28-29, Dec. 1967, and attorney Luis Kutner's Petition for Writ of "World Habeas Corpus" presented to the United Nations Human Rights Commission in July, 1967.

47. For a discussion of the principle with respect to jurisdiction in extradition proceedings, see Bassiouni, 36 TENN. L. REV., *supra* note 10, at 10-12, and O'Higgins, *Unlawful Seizure and Irregular Extradition*, [1960] 36 Y.B. INT'L L. COMM'N 279. See also Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L. J. 427 (1957); Scott, *Criminal Jurisdiction of a State Over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953); and *Ker v. Illinois*, 119 U.S. 436 (1886), cited by numerous countries as a landmark for the *mala captus bene detentus* rule. See Hunt, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953); Preuss, *Settlement of the Jacob Kidnapping Case*, 30 AM. J. INT'L L. 123 (1936); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935); Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

48. See Argentina's protest against Israel for the kidnapping of Eichmann and the Security Council's condemnation of Israel, 15 U.N. SCOR, U.N. Doc. S/4349.

The measures which are outlined above are extraordinary in the extra-legal sense, since an ordinary, *i.e.*, legal, process exists, and this author would propose borrowing a Roman Law maxim to interdict this practice: *Nunquam Decurritur Ad Extraordinarium Sed Ubi Deficit Ordinarium*.<sup>49</sup>

INTERNATIONAL CRIMES: THE EXCEPTION TO THE  
"POLITICAL OFFENSE" EXCEPTION

Offenses against the Law of Nations or *Delicti Jus Gentium* by their very nature affect the world community as a whole.<sup>50</sup> As such, they cannot fall within the "political offense" exception because, even though they may be politically connected, they are in derogation of the laws of mankind in general and international criminal law in particular.<sup>51</sup> To disregard such an exception to the exception would be in itself violative of international law and disruptive of world public order. Such offenses are specifically proscribed by international law *in restricto*, which imposes upon the violator individual responsibility; however, *in extenso* conduct, which is disruptive of world public order, may also be considered violative of international law.

The specific violations of international criminal law *in restricto* include, but are not limited to, slavery, piracy at sea and in the air or, "hijacking," offenses against the peace and security of mankind (including aggression), war crimes, serious violations of the Geneva Conventions, and genocide.<sup>52</sup> Despite their possible political connection, these crimes are proscribed by international law because the

49. *Never resort to the extraordinary but and until what is ordinary fails.* INSTITUTES 4:84. (Translation and emphasis by author).

50. See MUELLER & WISE, *INTERNATIONAL CRIMINAL LAW* (1965); RIPOLLES, *TRATADO DE DERECHO PENAL INTERNACIONAL Y INTERNACIONAL PENAL* (1955-57); ST. GLASER, *INTRODUCTION A L'ETUDE DU DROIT INTERNATIONAL PENAL* (1954); JESCHECK, *DI VERANT-WORLTICHKEIT DER STAATSORGANE NACH VOLKERSTRAFRECHT: EINE STUDIE ZU DEN NURNBERGER PROZESSEN* (1952); KEENAN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); PELLA, *LA CRIMINALITE COLLECTIVE DES ETATS ET EL DROIT PENAL DE L'AVENIR* (1926); and DONNEDIEU DE VABRES, *supra* note 28.

51. See Garcia-Mora, *Crimes against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927 (1964); Garcia-Mora, *War Crimes and the Principle of Nonextradition of Political Offenders*, 9 WAYNE L. REV. 269 (1963); Green, *Political Offense, War Crimes and Extradition*, 11 INT. & COMP. L. Q. 329 (1962); Neuman, *Neutral States and the Extradition of War Criminals*, 45 AM. J. INT'L L. 495 (1951).

52. Since this article does not contemplate a study of international crimes in general, a reference to them is made herein and some specific cites are offered.

On slavery, see Fischer, *The Suppression of Slavery in International Law*, 3 INT.

world community has, with respect to such crimes, an interest in preserving the peace and security of mankind and in combatting this type of criminality. These are crimes against mankind because mankind has come to so recognize them after they became part of the common values and the common morality of man. The issue in such cases is no longer the opposability of extradition because of the political connection of those crimes, but rather their ipso facto exclusion from consideration as part of the exception because they are part of the internationally defined offenses.

There is a difficulty, however, in determining what these offenses are, their precise elements, and the factual establishment of their occurrence. Conceptually, agreement is reached on the notion of an "exception to the exception," but in fact, it will still require the codification of international crimes. Thereafter, they can either be adopted by municipal law, in which case states will prosecute the offender wherever he is found, or they can remain international if their enforcement is by an international criminal court. The efforts of scholars, the International Law Commission of the United Nations, and international organizations, are developing such pro-

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L. Q. 28-51 and 503-22 (1950); Gutteridge, *Supplementary Slavery Convention*, 1956, 6 INT. & COMP. L. Q. 449 (1957). On crimes against the peace and security of mankind, see PELLA, *LE CODE DES CRIMES CENTRE LA PAIX ET LA SECURITE DE L'HUMANITE* (Geneva, 1951); PELLA, *LA CRIMINALITE COLLECTIVE DES ETATS ET LE DROIT DE L'AVENIR* (Geneva, 1949); Johnson, *The Draft Code of Offences against the Peace and Security of Mankind*, 4 INT. AND COMP. L. Q. 445 (1955); II YEARBOOK OF I.L.C. 133-37 (1951); II YEARBOOK OF THE I.L.C. 149-52 (1954); Graven, *Principes Fondamentaux d'un Code Repressif des Crimes Centre la Paix et la Securite de l'Humanite*, 28 REVUE DE DROIT INTERNATIONAL 173 (1950); KEENAN AND BROWN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); Parry, *Some Considerations upon the Content of a Draft Code of Offences against the Peace and Security of Mankind*, 3 INT. L. Q. 208 (1950); Whiteman, *Plan for a World Criminal Code*, 3-4 REVUE INTERNATIONALE DE DROIT PENAL 248 (1946). On the Geneva Convention, see the GENEVA CONVENTIONS OF AUGUST 1949 (Geneva, 1950); 3 U.S.T.L.Q./A. No. 3662-3665 (1955); Yingling and Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393 (1952). On genocide, see G.A. Res. 96(i) U.N. Doc. — at — (1946); Bassiouni, *The War Power and the Law of War: Theory and Realism*, 18 DE PAUL L. REV. 188 (1968). On aggression and war crimes, see STONE, *AGGRESSION AND WORLD ORDER* (1958); POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* (1953); Roling, *International Criminal Jurisdiction*, 1955 NETHERLANDS INT'L L. REV. 167; Jescheck, *Die Entwicklung des Volk Erstrafrechts Nach Nurnberg*, 72 S.Z.F.Str.R. 217 (1957); Baxter, *The Definition of War*, 16 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 528 (1951); DROST, *THE CRIME OF STATE: GENOCIDE* (1959); WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1960); TRIFFTERER, *DOGMATISCHE UNTER-SUCHUNGEN ZUR ENTWICKLUNG DES MATERIALLEN VOLKSTRAFRECHTS SEIT NURNBERG* (1964). On Piracy, see I OPPENHEIM, *INTERNATIONAL LAW* 609 (8th ed. 1955).

posals.<sup>53</sup> Their adoption by the nations of the world is slow, but such relentless and dedicated efforts are bound to bear results. Note, however, that most extradition treaties make specific mention of the exclusion of war crimes and genocide from the political offense exception. Most military and criminal codes also refer to violations of the Laws of War as military crimes.

It is beyond the scope of this article to analyze international crimes, which are excluded from the meaning of the political offense exception to extradition. Suffice it to state that those crimes are excludable even though there is much uncertainty and controversy about them, except in the treaties between the Soviet Union and all Eastern European countries other than Yugoslavia.

#### WHAT IS A "POLITICAL OFFENSE?": THE SEARCH FOR CRITERIA

The problem of the political offense exception arises first as a definitional one, which usually sees fruition in a compromise clause in a treaty. Thereafter, it becomes a matter of judicial interpretation by the extradition magistrate, whose duty it is to interpret and apply the provisions of the treaty. Finally, a discretionary veto is available to the executive branch.<sup>54</sup> Those countries which make it an administrative rather than a judicial process have, of course, no difficulty in rationalizing their decisions. All multilateral treaties exempt "political offense" from extradition and so do the overwhelming ma-

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53. The International Law Commission has made several attempts at the codification of international crimes, but no agreement has been reached to date. See Int'l L. Comm'n, Report of 1950, U.N. GAOR, V. Supp. 12CA; [1951] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/1858 and U.N. Doc. A/2693 (1954). Numerous scholarly publications in this field include: Johnson, *The Draft Code of Offenses against the Peace and Security of Mankind*, 4 INT. & COMP. L. Q. 445 (1955); Graven, *Principes Fondamentaux d'un Code Repressif des Crimes Contre la Paix et la Sécurité de L'Humanité*, 28 REVUE DE DROIT INTERNATIONAL 173 (1950); KEENAN AND BROWN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); Parry, *Some Considerations upon the Content of a Draft Code of Offenses against the Peace and Security of Mankind*, 3 INT'L L. Q. 208 (1950); ST. GLASER, *INFRACTIONS INTERNATIONALES* (1957); PELLA, *LE CODE DES CRIMES CONTRE LA PAIX ET LA SECURITE DE L'HUMANITE* (1951); DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* (1928); PELLA, *LA CRIMINALITE COLLECTIVE DES ETATS ET LE DROIT PENAL* 45 L'AVENIR (1949); and TRAVERS, *LE DROIT PENAL INTERNATIONALE* (1920-1922).

54. *Supra* note 29. For the American practice, see *supra* note 10. With reference to executive discretion, see Bassiouni, 36 TENN. L. REV., *supra* note 10, at 25-27, and Comment, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1314 (1962).

jority of bilateral treaties.<sup>55</sup> The term itself, according to Oppenheim, was unknown in international law until after the French Revolution.<sup>56</sup> Its rise was due to the emergence of constitutionalism in the nineteenth century, when the right to freedom and to revolt for freedom became an active reality. Its mottos were set by the eighteenth century philosophers, who drew largely on the humanism of their predecessors.

Whenever the law which was violated embodied political values or the protection of political structures, and the actor was moved by his commitment to differing ideological values or beliefs seeking to affect such interests without committing a private wrong, the crime committed was said to have been "purely political." Whenever such crime also involved the commission of a common crime, *i.e.*, a private wrong, it ceased to be a purely political crime. It could then be labelled a "relative political offense" or a common crime.<sup>57</sup>

A distinction must be established between moral, intellectual, ideological, or political opposition not translated into any material conduct, such as verbal pronouncements exhibiting dissent or disagreement which do not advocate violence, and conduct which, in addition to its political ingredients, involves the commission of common crimes. Between these extremes lies the grey area of uncertainty. If the political offense is conduct which violates positive law, but which was motivated or necessitated by the political objective, then the question is: How far can violations of positive law, which are considered violative of municipal public order, be tolerated and allowed to fall within the exception? There are two aspects to this query: (1) the nature, intensity, and number of such violations; and (2) the standard of inquiry which shall be applied to determine

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55. See, *e.g.*, The Montevideo Convention (1933), the Arab States Convention (1952), the European Convention on Extradition (1957), the Afro-Asian Conference Countries' Convention (1961), and the Benelux Convention on Extradition (1962), which all provide for a political offense exception.

The above conventions are cited and discussed in BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* at 218-40 (1968). See also DeSchutter, *International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries*, 14 NETHERLANDS INT'L L. REV. 382 (1967); O'Higgins, *European Convention on Extradition*, 9 INT. & COMP. L. Q. 491 (1960); Honig, *Extradition by Multilateral Convention*, 5 INT. & COMP. L. Q. 549 (1956); and DeFreitas, *A European Extradition Convention*, 41 TRANS. GROTIUS SOC. 25 (1955).

56. 1 OPPENHEIM, *INTERNATIONAL LAW* 704 (Lauterpacht 8th ed. 1955).

57. The distinction between *delits complexes* and *delits connexes* was first made by Billot in his *TRAITE DE L'EXTRADITION* 104 (1874).

the overall nature and character of the conduct, *i.e.*, objective or subjective.

The tendency is usually to balance the nature and intensity of the violation in terms of its commonly accepted social significance versus the objective or subjective necessity of reverting to such conduct in order to obtain the political impact desired. Implicit in such a balancing concept is the weighing of the "urgency" and "need" factors which prompted the relator to assault the political order and the "commensurateness" or "proportionality" of the means used by the violator to the transgression of those values or rights which the political offender seeks to protect or protest. This, of course, is a value-oriented evaluation, because its factors, while allegedly objective, are themselves value-based and value-oriented; and therein lies the tendency to accept subjective standards rather than to formulate objective criteria. Notwithstanding any declaration by a nation-state of its adherence to objective standards, such standards will not become truly objective unless they represent the average, common, reasonable judgment of all peoples of the world community. Any substitute becomes a limited objective standard—one that is based on the common values of the ordinary reasonable man of the asylum state—which allows the imposition of the common and popular ideals and values of one nation-state upon another.

#### THE PURELY POLITICAL OFFENSE

Such an offense is usually conduct directed against the sovereign or a political subdivision thereof. It constitutes a subjective threat to a political ideology or its supporting structures without any of the elements of a common crime. It is labelled a "crime" because the interest sought to be protected is the sovereign. The word "sovereign" includes the political integrity, safety, and all the intangible factors pertaining to the functions and functionalism of a political organization. Conduct which affects the sovereign as described is a crime in that it violates a positive law, but a law which is designed and destined to protect the "public interest" by making attack upon it a "public wrong" and not a "private wrong" as in the case of "common crimes."

The sovereign is the public authority which, representing the ideals of the people, exercises power, whether limited or unlimited, and directs the affairs of the collectivity for the attainment of certain

aims, whether popularly shared or imposed.<sup>58</sup> The authority of the sovereign is limited only by its constitutional structure, if any, and only with respect to the exercise of its internal authority. The justification for laws protecting the processes and structures through which the sovereign manifests its authority is based on the notion that the sovereign serves the "public interest."<sup>59</sup> Thus, the "public interest" is transgressed by conduct which impedes the governmental process or its structure and disturbs the peace, tranquility, or lawful functioning of societal activity; as such it is a public wrong justifying criminal sanctions. The substantive and procedural context of this "public interest" concept is politico-legal and is beyond the scope of this paper.<sup>60</sup> One may, however, conclude that conduct directed against the "public interest" expressed by the sovereign is a "purely political crime."

Treason, sedition, and espionage are offenses directed against the state itself and are, therefore, by definition a threat to national security and the well-being of the body politic. As such, they are "purely political offenses."<sup>61</sup> The Constitution of the United States limits treason to levying war against the United States, adhering to its enemies, or giving them aid and comfort.<sup>62</sup> It further requires that no person shall be convicted of treason unless the conviction is based upon the testimony of two witnesses to the same overt act. This definition presupposes allegiance to the United States; an alien, therefore, can never be guilty of treason, even for the commission

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58. See Bassiouni, *supra* note 24, at 282-85.

59. See Miller, *Foreword to The Public Interest Undefined, Fundamental Concepts of Public Law Symposium*, 19 J. PUB. L. 195-97 (1967).

60. *Id.* See also Sorau, *The Public Interest Reconsidered*, 19 J. POL. 616-30 (1957).

61. See Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964); and Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247 (1933).

*In re DeBernonville*, (1955) I.L.R. 527, holds that, "treason to country [is] among political crimes, the authors of which are not subject to extradition". *Accord*, *Ex parte Kolcynski*, 1 Q. B. 540 (1955): "Treason is an offense of a political character." In *Chandler v. United States*, it was held *inter alia* that political offenders include persons charged with treason. 171 F.2d 921 (1st Cir. 1948). In *In re Ockert*, [1933-1934] Ann Dig. 369 (No. 157), it was said, "high treason, capital treason and the like [are political offenses] because the offense is against the state and its principal organs."

62. See U.S. CONST. art. III, § 3 and 18 U.S.C. § 2381 (1948). See also Bassiouni, *supra* note 24, at 285-89.

of an act which would be treason if committed by a citizen.<sup>63</sup>

Aside from the question of the elements of treason as an offense, the concept gives rise to a variety of confusing by-products. The disturbing trend of proliferating treasonous offenses to encompass a variety of forms of political opposition is increasing in almost all countries of the world. One author noted that:

Although the Soviet formulation reflects the traditional law in regarding treason as breach of allegiance to the State, it nevertheless goes amazingly far in lumping together treason, desertion and espionage, and, even more striking, in setting up escape or flight abroad as a treasonable act.<sup>64</sup>

Sedition requires only a communication intended to incite a violation of public peace with intent to subvert the established form of government. The offense is complete upon the utterance, and there is no necessity for any actual riot or rebellion occurring. Sedition is an insurrectionary movement, tending toward treason, but wanting an overt act. It disturbs and affects the stability and tranquility of the state by means not actionable as treasonous. The distinction between treason, sedition and inciting to riot is relative.<sup>65</sup>

Espionage is universally seen as obtaining or attempting to obtain secrets which deal with national security or defense for the benefit of some foreign state. Unlike treason, there is no allegiance required on the part of the offender—no duty which must be breached. It is predicated on the notion of “public wrong.”

Treason, sedition, espionage, and dissent by speech and writings, if they do not incite to violence, are considered “purely political offenses,” because they lack the essential elements of “common crimes” in that the perpetrator of the alleged offense acts merely as an instrument or agent of a political thought or movement and is motivated by ideology and beliefs. There is no way of defining what a “purely political crime” can be in a manner that would exhaust the imagination of lawmakers. Probably the most useful criterion which can be offered is that: Whenever the conduct of the actor is limited to the

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63. *Rosenberg v. United States*, 346 U.S. 273 (1953); *Dennis v. United States*, 341 U.S. 494 (1951); *Hanauer v. Doane*, 79 U.S. 342 (1870); *Kramer v. United States*, 147 F.2d 756 (6th Cir. 1945); Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944).

64. Garcia-Mora, *supra* note 61, at 74. Compare SOVIET CRIMINAL CODE arts. 63-88 (1965) with 18 U.S.C. §§ 791-97 (1965) and 18 U.S.C. 951-69 (1965). See also BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 178-86 (1966).

65. For sedition in American law, see BASSIOUNI, *supra* note 24, at 289-91.



disclosure of ideas by words, symbolic acts, or writings not inciting to violence and exclusively directed against the "public interest" represented by the sovereign or manifested by any of its political subdivisions and not involving a private wrong or common crime, it is a "purely political offense."<sup>66</sup>

#### THE RELATIVE POLITICAL OFFENSE

The term "relative political offense" is used as a counterpart to "purely political offense." While the latter affects the "public interest" and therefore causes a public wrong, the former includes the commission of a common crime in furtherance of a political purpose. It is also referred to as a "quasi political offense" because of the combined political purposes and private harm committed. Judicially, neither term is accurate; at best they are descriptive labels. The nature of the criminal violation performed by the offender is admittedly a common crime, which, by definition, is a private wrong. This resulting harm is not altered by the offender's peculiar reasons or motives, whether political or otherwise. The nature of the crime committed is, therefore, not affected by the actor's motives and cannot accordingly be made dependent upon them. There is nothing that makes the crime "political," but the circumstances attending the commission of the crime and the factors and forces which may have lead the actor to such conduct make the offense complex (*delit complex*) and deserving of special consideration.<sup>67</sup> Such consideration will focus directly upon the offender's motives even though theories of criminal law remove motive from the elements of criminal offenses.<sup>68</sup> The element of intent required for all serious crimes bears upon the state of mind of the actor at the time he committed the

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66. Civil disorders in the United States, such as the riots of the sixties in major American cities, could be considered common crimes, relative political offenses, or purely political offenses depending upon one's ideological position. That the United States government considers such acts common crimes is witnessed by the "Chicago Conspiracy" trial of the seven defendants accused of such crimes during the 1968 Democratic Convention in Chicago. See 18 U.S.C.A. §§ 231, 232 (1968). All states have legislation which prohibits conduct such as disturbing the peace and arson which is used against ideological demonstrators.

67. But see *Youssef Said Abu Dourrah v. Attorney General*, 8 Law Rep. Palestine 43 (1941): "We know of nothing in the criminal law of this country or of England that creates a special offense called political murder." See also [1941-1942] ANN. DIG. 331, at 332.

68. See BASSIOUNI, *supra* note 24, at 62.

*actus reus*. As such, the *mens rea* does not contemplate the reason why, the ulterior reason, or the motivating factors which brought about this state of mind.<sup>69</sup> Certainly motive is relevant in proving intent, but it is not an element of the crime and, therefore, has no bearing on whether or not the actor's overall conduct, accompanying mental state, and its resulting harm will be characterized a crime.

The criminality of an actor under most penal systems is determined primarily by *what* he did rather than *why* he did it. Motive becomes a secondary factor in all instances except where a legal defense is available.<sup>70</sup> One may, however, question the proposition that a proper motive constitutes part of a legal defense to extradition for conduct otherwise deemed criminal. Arguments with reference to motive and other penal policies significant in any penal system are not so in extradition, because the matter is not inter-system but intra-system and that which is significant to a municipal penal system has little or no bearing on inter-state relations which are affected by their respective public manifestations and not by their respective internal policies. There is no basis to warrant the assumption that states are concerned with the preservation or safety of their respective penal systems and penal policies, unless they have a mutual interest in the maintenance of their respective political structures which they would seek to strengthen by maintaining or reinforcing their respective internal penal policies and factors affecting their municipal public safety.

It is a valid assumption that whenever a state does not share the interest in maintaining the political ideology, system, or policies of another state, that it is less likely to exhibit concern or interest in the maintenance of the internal structures and public safety of that other state. In this case, it is more likely to examine the motives of the offender and find some redeeming value or merit in his conduct, if it is deemed political, and they will refuse to extradite him. As matters presently stand, this is tantamount to absolving the offender from the penal consequences of his conduct which, if examined without regard to his motives, would be a "common crime" under the jurisprudence of either the state of refuge or the requesting state.

There is no uniformity in extradition law and practice as to what

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69. See BASSIOUNI, *supra* note 24, at 51-83.

70. See BASSIOUNI, *supra* note 24, at 84-157.

constitutes a quasi or "relative political offense." The degree of connection between the motivating political factor and the common crime is the subject of diverse national policies.<sup>71</sup> There is little if any international agreement as to the nature and type of connection which is to relate the political motive to the crime. At least three factors must be considered: (1) the degree of political involvement of the actor in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the "cause" (on behalf of which he has acted), and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political "cause;" (2) the existence of a "link" between the "political motive" (as expressed above in 1) and the crime committed; and (3) the "proportionality" or commensurateness of the means used (the crime and the manner in which it was performed) and the political purpose, goal or objective to be served. The first of these factors is wholly subjective, the second can be evaluated objectively, and the last is *sui generis*.

At least one tangible element emerges in the practice of all nations recognizing quasi-political offenses as falling within the purview of the political offense exception—the political element must dominate over the intent to commit the common crime in the mind of the actor and in the apparent significance of the said common crime, subject to the specific exclusions of given crimes according to state law and practice.<sup>72</sup> An examination of some cases will highlight these observations.

The English application is quite liberal, as enunciated in 1891, in *In re Castioni*.<sup>73</sup> Theirs is a "political incidence test," which encompasses acts connected, no matter how tenuously, to political turmoil.

The French view is that the political nature of each act does not depend on the existence or non-existence of political reasons, but only on the nature of the act considered in its essence. Under a judicial aspect, murder continues to be a crime of common order,

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71. See 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 779-857 (1959) and I OPPENHEIM, INTERNATIONAL LAW 707 (1958).

72. See Belgian Extradition Law of Oct. 1, 1833, Les Codes 693 (31st ed. 1965); *In re Fabijan*, (1933-1934) ANN. DIG. 360 (156) and *infra*, notes 73-79.

73. [1891] 1 Q.B. 149. The latest English case is *ex parte Kolczynski*, 1 Q.B. 540, noted in 49 AM. J. INT'L L. 411 (1955).

whatever the motives may be. The Court of Appeals of Grenoble in 1947, held, in the case of *Giovanni Gatti*,<sup>74</sup> that the offense does not derive its political character from the motive of the offender but from the nature of the rights injured.

Compare that point of view with an early American case refusing to extradite one Rudewitz to Russia in 1908. Upon refusal of the United States Commissioner for the Northern District of Illinois to grant extradition, the entire record of the hearing was transferred to the Secretary of State. The Secretary informed the Ambassador of Russia that: "In view of these facts and circumstances, the offenses with which the accused is charged are clearly political in their nature."<sup>75</sup> Subsequently, however, the American position was patterned after *In re Castioni*, even though *Castioni* preceded *Rudewitz*.

Professor Evans has made the following observation:

Where the fugitive was charged with homicide or with being an accessory thereto, the political defense was sustained in those instances in which it could be shown that the act had been committed in the course of a revolt or uprising or during a disturbed political situation in the state of origin, that the act had a political objective or that the fugitive feared political persecution if he were extradited. But where homicide was committed as an isolated act . . . of treachery or of personal revenge or without a logical relationship to a political objective, the plea of political defense was rejected and extradition granted.<sup>76</sup>

The nature of the offense is thus to be determined by the motive of the offender, although qualified by the attending circumstances, for while it is quite possible that the killer of a head of state feels that his act is justified because he disagrees with the philosophy of the power structure, that "political" motivation cannot be said to be the controlling element in determining the nature of the offense. Even the showing of a lack of personal vendetta may not be enough to bring the crime within the framework of the *delit complex*.

In 1928, the Swiss Court in *In re Pavan*,<sup>77</sup> limited the political offense to those crimes which are invested with a predominantly political character and only where the act is in itself an effective means of obtaining this object or where it is an incident in a general

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74. [1947] ANN. DIG. 145. See 2 LEVASSEUR, JURIS CHASSEUR DE DROIT INTERNATIONAL 405-10 (1965).

75. Letter from Secretary of State Elihu Root to Russian Ambassador Rosen, 1908, on file in Dep't of State, File no. 16649/9.

76. Evans, *supra* note 16, at 18.

77. [1928] ANN. DIG. 347. In the *Ktir* case decided by Switzerland, extradition was granted to France in 1961.

political struggle in which similar means are used by each side.

Generally, individual acts of assassination, terrorism, or anarchy will not be dignified as relative political offenses, no matter how politically motivated the perpetrator of the offense may have been. Where there is no actual movement or political force directed toward the overthrow of the existing government, any such offense will be seen as a common crime. This view was espoused by the English Court in *In re Ockert*,<sup>78</sup> in which the Court indicated that a crime which amounted to an act of terrorism without any relation to some particular political object would not give rise to grounds for asylum and extradition would be granted.

Renewed attempts to define "political offense" have been the subject of several recent enactments throughout the world and attest to the difficulty and diversity of approach and treatment to this inherently unruly question.<sup>79</sup>

One cannot help but be tempted to question the possible nature of three *causes célèbres* of the late sixties in the United States: Lee Harvey Oswald, killer of President John F. Kennedy and in turn killed by Jack Ruby; James Earl Ray, killer of the Reverend Martin Luther King, Jr.; and Sirhan Sirhan, killer of Senator Robert F. Kennedy. Assume Oswald had sought refuge in China, Ray in South Africa or Rhodesia, and Sirhan in Syria. An educated guess would put the three fugitives beyond the reach of extradition to the United States. Assume, *arguendo*, the same fugitives to have respectively chosen Ireland, Liberia and Israel; another guess is that if they survived local passions, they would have been delivered to United States authorities before the extradition request would have even been signed in Washington. One will probably never really know if these men acted on their own or as executioners on behalf of a group, movement, or

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78. [1933] ANN. DIG. 369.

79. For some recent foreign legislation in extradition containing an exception to political offenses, pure and complex, including military and fiscal offenses, see Swedish Law of Extradition of 6-12-1956; Moroccan Law of Extradition of 8-11-1958; Spanish Law of Extradition of 26-12-1958; Ghana Law of Extradition of 15-12-1960; Indian Law of Extradition of 15-9-1962; Sierra Leone Law of Extradition of 17-1-1963; Uganda Law of Extradition of 22-6-1964; Ireland Law of Extradition of 19-7-1965; Algerian Law of Extradition of 8-6-1966 (in Code of Criminal Procedure); Australian Law of Extradition of 27-10-1966; Netherlands Law of Extradition of 9-3-1967; and Danish Law of Extradition of 9-6-1967.

For American extradition treaties, see *Appendix A*. For federal statutes which regulate extradition matters, see 18 U.S.C. § 3181 *et seq.* (1968).

party. Whether moved by their own ill-conceived beliefs or as agents of a movement, assuming their sanity, one could advance the proposition that from his vantage point each was the object of a commitment to a "higher cause" which justified risking his own life as well as taking that of the victim.

Most penal systems in the world have adopted a policy of grading or dividing crimes designed to protect a given social interest into various levels of accountability. The purposes of such policy vary, but, in general, they signify that the criminality of an actor, being dependent upon what he does and how he does it, must be graded in such a manner as to have punishment fit the presupposed criminality of the actor. It is further believed that, because punishment is a deterrent, the multiplicity of offenses which relate to the same social interest by virtue of such grading will induce the potential offender to perform lesser harm whenever he engages in his intended criminal conduct. Whatever the reasons for a grading policy, one thing remains certain: too many technically different offenses cover or relate to the same social interest presumably sought to be protected.<sup>80</sup>

In addition to these considerations, a given social harm by reason of its significance will invariably contain lesser or included harms which, taken independently, are the subject of separate offenses but, in the context of what was actually done, are incorporated therein.

The ideologically motivated offender is not likely to commit a single or isolated criminal act. Most likely his conduct will incorporate several lesser included offenses or bear upon other non-included but related offenses. These multiple offenses may either arise from a single criminal act (a bomb placed in a plane which kills ten persons and destroys the plane will produce at least eleven different crimes), or from the same criminal transaction (an elaborate *Mission: Impossible*-type scheme involving several different crimes related by the single design or scheme of the actor). These related offenses technically may be *included offenses* whenever the elements of the higher degree offense are predicated on some or all of the elements of the lesser degree offense, in which case the existence of the lesser included offense would only be technical and not real. Other offenses deemed related but not included may be com-

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80. See BASSIOUNI, *supra* note 24, at 126.

mitted by the actor's design or by the necessity of his own scheme, such as, the common crime being committed only as a stepping stone or as a means to commit the offense really aimed at.<sup>81</sup> While lesser included offenses are *vertically* linked to each other, related offenses are *horizontally* linked. The former type of multiple offense merges into the greater, while the latter type does not merge and each crime may be the subject of separate prosecution.

The determination of the relationship of all offenses committed as part of the scheme of the "relative political offense" is, perhaps at first, one of motive, but further inquiry must be made into the nature of the criminal transaction. This inquiry leads to the following questions: (1) Were all the offenses committed part of the "same (political) criminal transactions?" (2) What were the number and extent of these violations? (3) How were they related in scope, time, place and social significance? (4) To what extent did the political scheme necessitate the commission of such multiple offenses? (5) Could they readily be identified as legally "included offenses," or did they appear to be related only by the actor's design?

One interesting question which could arise at this point is: What if this inquiry concluded only partially in favor of the relator? Shall the extradition judge or executive authority weigh the degree of compliance of the relator's conduct to these tests versus his noncompliance and determine its outcome by a "preponderance of compliance" test? Or shall he disqualify the relator from the benefit of the "political offense" exception because there was a single instance of non-compliance? In this case we also see the limited chances of a juridical solution in a world system wherein the ultimate relationship between political units is predicated upon a concept of co-equal sovereigns exercising all-too-often conflicting, co-equal authority. Were the alternative a vertical jurisdictional authoritative process, the issue would then be removed from the contentious or opposing co-equal horizontal authoritative process and some opportunities for direct conflict would therefore be eliminated.

#### A PROPOSED JURIDICAL CRITERION FOR THE "POLITICAL OFFENSE EXCEPTION"

Searching for an objective standard can lead to an analogy to the

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81. See BASSIOUNI, *supra* note 24, at 126.

law of self-defense as commonly accepted in all penal systems, wherein a person is justified in causing harm to another to insure his own safety. The primary consideration in the law of self-defense is a value-judgment based on the inherent justification of self-preservation and its overriding exonerating effect on the consequences arising out of the potential harm to be inflicted upon the aggressor. The means authorized, the use of force, is dependent upon the nature of the potential harm sought to be inflicted by the aggressor on the victim and the latter's need to prevent such harm from occurring. Hence, if fundamental human rights are seriously violated by an institutional entity or a person or persons wielding the authority of the state and acting on its behalf without lawful means of redress or remedy being made available, then the responsibility of the individual, whose conduct was necessitated by the original transgression by reason of his need to redress a continuing wrong, is justified or mitigated and, therefore, warrants a denial of extradition.

This right to ideological self-preservation or political self-defense is predicated on three categories of factors: First, *factors bearing upon the nature of the "rights" involved, which were originally violated and gave rise to the right to defend them.* These include: (a) the nature of those "rights" and their sources; (b) the extent to which those "rights" are indispensable or necessary to the survival or basic values of the people; (c) the historical and traditional existence of those "rights" and the degree of their availability and enjoyment by the people; (d) the extent of the people's reliance upon them in relation to their implantation in the social psychology as necessary, indispensable or fundamental to the way of life; (e) the duration of their abridgement and, if sporadic, their recurrence; (f) the potential or foreseeable voluntary termination of the transgression by the violating body or person; and (g) the existence or reasonable availability of a local or international remedy or legal method of redress of such wrongs. These factors, for the most part, can be ascertained objectively and tangibly by impartial and objective inquiry into their existence and their validity by the extradition magistrate or the executive authority in the exercise of his discretionary power to grant or deny extradition.

Second, *factors bearing upon the conduct of the nation-state which were seriously violative of these "fundamental rights."* These



include: (a) the nature of the transgression, abridgement, violation, termination, subversion or abolition of the "right" or "rights" claimed; (b) the quantitative and qualitative evaluation of the violations; (c) the manner in which they were violated, the extent of the violation, the means used to accomplish it, the duration of the violation, and the frequency of their recurrence; (d) the avowed or implicit intentions of continuing these violations or their termination within a declared or foreseeable future; (e) whether these violations were conditioned, caused, prompted or forced by conditions of necessity, such as natural catastrophies, disasters, war, insurrection, or other factors affecting the physical and tangible existence or viability of the nation-state which would justify or mitigate such conduct; (f) any methods or means of redress, remedies or channels open or made available to the aggrieved party or group to which the relator belongs; (g) any repressive actions taken against those who claimed grievance and pursued legal channels of remedy in the prescribed manner or who challenged the offensive public conduct in a manner deemed lawful by the common standards of the ordinary times of that nation. The factors in this category also lend themselves to objective inquiry.

Third, assuming the existence and validity of the conditions of the factors in the first and second categories, *factors bearing upon the conduct of the individual who violated the positive law of the state in defense of these "Fundamental Human Rights."* These include: (a) exhaustion of all available remedies, local and international, saving risks of repression; (b) the explicit or implicit common understanding in the ordinary reasonable man (of the nation-state in question) that no redress was available in the reasonably foreseeable future and that such conduct was, if not warranted, at least, excusable (exonerating or mitigating) because no other alternative existed; (c) whether the individual's conduct was proportionate or commensurate with the nature of the right or rights violated in terms of their objective significance in the common understanding of the ordinary reasonable man of the nation-state wherein the conduct took place; (d) whether the individual's conduct was related only to the original wrong in a negative or vengeful aspect or whether it was also intended to terminate it or to affect its redress and, thus, have a positive aspect to it; (e) whether the means used were limited to achieve these purposes and

there was no violation committed which was not necessitated by the attainment of such goals through the least harmful manner; (f) whether the assumption of any risks created would fall on the individual perpetrator, and whether the means and tactics used would not endanger innocent persons.

This theory of ideological self-preservation is not advanced as a means to warrant or justify lawlessness, or anarchy, but is intended to relate an otherwise nebulous concept, which has been the subject of nefarious political manipulations, to the sphere of a legally or judicially manageable theory of law. While it is beyond the scope of this paper to expose and discuss the ramifications of such a proposition, this proposed theory is intended to lay a juridical framework to what could be considered a politically motivated offense, which would shield its perpetrator from the repressive powers of the state against which the violation was directed.

To discern between objective and subjective standards of evaluating the nature of the relator's conduct is not only a procedural question, but a substantive one, because it is outcome determinative of the issue of extraditability of the relator. Such a choice by national public policy is one which is largely determined by the overall political outlook of the nation-state in terms of its place in the relationship between the nation-states of the world community and the ideological political alignment of the nation-state in question. To promulgate an objective standard, however, requires the acceptance of a decision made in furtherance thereof and would eliminate opportunities for conflicts.

#### CONCLUSION

The realization that such problems as may be caused by the political issues inherent in extradition law are more serious in political offense questions leads us to the need for change. To avoid the potentially detrimental effects of such problems, one solution is to remove the question in its entirety from the decision-making process of the nation-states involved. This presupposes an international organ such as the International Court of Justice or a specialized branch thereof to have either exclusive or appellate jurisdiction over such matters by the previous consent of all nations of the world ad-

hering to a universal treaty-statute on extradition.<sup>82</sup> The more preferable procedure is to grant the international judicial decision-making organ the exclusive jurisdiction over such cases, so as to avoid any inflammatory situations which may precede its handling of the matter if it were to have only appellate review functions.

The problem of the "political offense," however, goes beyond that. The definitional issue could be resolved by the treaty-statute, while the interpretative issue could be based on certain objective criteria designed to eliminate the high degree of subjective evaluation presently undertaken by most countries and which has lent itself to political rationalizations and threats to world public order. The purely political decision involving executive discretion in conceding or denying extradition will also be eliminated by such a proposal.

The most serious question will remain that of insuring a fair trial for the accused, and punishment which would not be cruel and unusual. This will remain difficult if the extraditee is to be returned to the jurisdiction wherein he committed the offense. The alternative would be to have the state of asylum exercise jurisdiction over him and prosecute him on behalf of the jurisdiction wherein the offense took place, using the laws of the jurisdiction against which the accused committed the alleged offense.<sup>83</sup> The offender could then be alternatively confined, if the sentence is imprisonment, either in the state where the offense was committed or in the state where the offense was prosecuted, *i.e.*, the state of asylum. For countries which adhere to the strict territorial jurisdiction concept, this would seem a radical suggestion, but for most European countries this is already practiced in some respect.<sup>84</sup> Even for countries like the United States, this would present no theoretical difficulties with respect to international crimes, as the theory of jurisdiction in such cases is universal jurisdiction.

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82. See *supra* note 9.

83. See Jessup, *The Doctrine of Erie Railroad v. Tomkins Applied to International Law*, 33 AM. J. INT'L LAW 740 (1939); Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932); WRIGHT, *THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH THE MUNICIPAL COURTS OF THE UNITED STATES* (1946); and Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 792 (1952, 1953).

84. See DeSchutter, *International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries*, 14 Netherlands Int'l L. Rev. 382 (1967).

Thus, we can insure punishment of the offender *aut dedere aut punire* without violating his human rights and right to procedural fairness and simultaneously avoid disruptions of world public order, since there would be an alternative means to the pitting of two or more nation-states against each other. Ideally, of course, the offender would be tried by an international criminal court and imprisoned in an international institution. The international military tribunal at Nuremberg and the Spandau prison stand as primary examples of the feasibility of this proposal.

The attainment of world peace is dependent upon the maintenance of rules designed to safeguard world public order and to establish legal channels as alternatives to the violent means which prevail in their absence. The "rule of law" is not an ideological equalizer or a method of compromising opposing political doctrines, but a process of ordering and channelling conflicts through legal institutions designed for the peaceful resolution of conflicts in a juridical context. It is the gradual building of needed international legal structures, not by ideologically superimposing such structures on the nation-states, but by creating them to serve special purposes designed to eliminate direct confrontations having potential for disruption of world order and world peace.

## APPENDIX A

THE "POLITICAL OFFENSE CLAUSE"  
IN AMERICAN EXTRADITION TREATIES

The United States is a party to treaties (presently in force) with eighty-three countries, all of which contain an exception clause to the extradition of a person charged with a "crime or offense of a political character." A comparison of American treaty provisions is very revealing of the attempt to avoid giving a definition of "political offense." Recent efforts to provide a workable definition of the clause must be recognized, but they are, in the final analysis, symptomatic of the problem itself.

In all fairness, one must concede that the nature of the conduct of the relator in its ideological context is one which by its very essence defies definition in the classical sense of criminal law in an ideologically divided and politically embattled world. The search for a treaty proviso will, therefore, almost always be broad and flexible, so as to be ultimately "politically manageable."

The definitional problem is the product of negotiations in a spirit of cooperation between governmental representatives who seek to bind their country to a treaty bearing essentially on judicial assistance in penal matters. The interpretation by the magistrate is often made in a less amiable context. The executive discretionary power, which is exercised thereafter, finds itself confronted by political issues which are all too often removed from the juridical merits of the issue.

A comparative grouping of American extradition treaty provisions follows, demonstrating clearly the vagueness of the purported definition of "political offense" and also clearly revealing its "political manageability." Citations for the treaties will be found in *Appendix B*.

The treaties with Albania (1933), Ecuador (1872), Hungary (1856), Indonesia (1887), Italy (1868), Monaco (par. 1, 1939), the Netherlands (1887), and the United Arab Republic (deemed binding on the UAR, formerly Egypt, 1874) state:

The provisions of this treaty shall not apply to any crime or offense of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime, committed previously to that for which his or their surrender is asked.

This provision merely declares the right to refuse extradition for what it fails to define.

The treaties with Belgium (1901), Guatemala (1903), Haiti (1904), Luxembourg (1883), Mexico (1903), Nicaragua (1905), Poland (1927), San Marino (1906), and Turkey (1923) state:

The provisions of this Convention shall not be applicable to persons guilty of any political crime or offense or of one connected with such a crime or offense. A person who has been surrendered on account of one of the common crimes or offenses mentioned in article . . . , shall consequently in no case be prosecuted and punished in the State to which his extradition has been granted on account of a political crime or offense committed by him previously to his extradition or on

account of an act connected with such a political crime or offense, unless he has been at liberty to leave the country for one month after having suffered his punishment or having been pardoned.

While the words *political crime or offense* are often repeated, neither one is defined or given a meaning. The following exception which appears in the same treaty provisions is explicit in that it excludes certain acts from the undefined meaning of "political offense":

An attempt against the life of the head of a foreign government or against that of any member of his family, when such attempt comprises the act either of murder or assassination or of poisoning, shall not be considered a political offense or an act connected with such an offense.

The treaties with Colombia (1886) and Japan (1886) state:

If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offense of a political character, surrender shall not take place; nor shall any person surrendered be tried or punished for any political offense committed previously to his extradition, or for any offense other than that in respect of which the extradition is granted.

The clause:

A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character

is in the treaties with Australia (1931)\*, Bolivia (1900), Burma (1931)\*, Canada (1842), Ceylon (1931)\*, Chile (1900), Congo (Brazzaville, 1901), Cuba (1904), Cyprus (1931)\*, Denmark (1902), France (1909), Ghana (1931)\*, Guyana (1931)\*, Iceland (1902), India (1931)\*, Ireland (1889), Kenya (1931)\*, Lesotho (1934), Malawi (1931)\*, Malaysia (1931)\*, Malta (1931)\*, New Zealand (1889), Nigeria (1931)\*, Norway (1893), Pakistan (1931)\*, Panama (1904), Sierra Leone (1931)\*, Singapore (1931)\*, South Africa (1947), Tanzania (1931)\*, Trinidad and Tobago (1931)\*, United Kingdom (1931) and Zambia (1931)\*.

The treaty with Argentina (1896) states that:

Extradition shall not be granted for a crime or offense of a political character nor for those connected therewith.

No person delivered up in virtue of this treaty can be tried or punished for a political crime or offense, nor for any act having connection therewith, committed before the extradition or surrender of such person.

\*Extradition Treaty with the United Kingdom (1931) later adopted by the country upon receiving its independence.

In case of doubt with relation to the present article, the decision of the judicial authorities of the country to which the demand is directed shall be final.

Another provision is:

The provisions of the present treaty shall not import a claim of extradition for any offense of a political character, nor for acts connected with such offenses; and no person surrendered by or to either of the parties in this treaty shall be tried or punished for a crime or offense.

The State applied to or the courts of that State shall decide whether the offense is of a political character or not.

When the offense charged comprises the act of either murder or assassination or of poisoning, either consummated or attempted, the fact that the offense was

attempted or committed against the Sovereign or Head of any State or against the life of any member of his family, shall not be deemed sufficient to sustain that such offense was of a political character; or was an act connected with offenses of a political character.

This language is found in the treaties with Austria (1930), Bulgaria (1924), Costa Rica (p. 1, 1922), Cuba (p. 3, 1904), Czechoslovakia (1925), Denmark (p. 3, 1902), Dominican Republic (1909), El Salvador (1911), Estonia (1923), Finland (1924), Germany (Federal Republic, 1930), Greece (1931), Honduras (1909), Iceland (p. 3, 1902), Iraq (1934), Latvia (1923), Liberia (1937), Liechtenstein (1936), Lithuania (1924), Paraguay (1913), Portugal (1908), Romania (1924), Spain (1904), Thailand (1922), and Venezuela (1922). Excepting assassinations, no further definition or meaning is given to what is the "political offense."

The search for some objective criteria and for a semblance of a definition, even though stated negatively, appears in the treaties with Brazil, Israel, and Sweden. The treaty with Brazil (1964) states:

When the crime or offense for which the person's extradition is requested is of a political character, he shall not be extradited. Nevertheless:

1. The allegation by the person sought of a political purpose or motive for the request for his extradition will not preclude that person's surrender if the crime or offense for which his extradition is requested is primarily an infraction of the ordinary penal law. In such case, the delivery of the person being extradited will be dependent on an undertaking on the part of the requesting state that the political purpose or motive will not contribute toward making the penalty more severe.

2. Criminal acts which constitute clear manifestation of anarchism or envisage the overthrow of the basis of all political organizations will not be classed as political crimes or offenses.

3. The determination of the character of the crime or offense will fall exclusively to the authorities of the requested state.

When the crime or offense for which the person's extradition is requested is purely military, extradition will not lie.

The treaty with Israel (1963) states:

Extradition shall not be granted when the offense is regarded by the requested State as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with the view to trying him or punishing him for an offense of a political character.

The treaty with Sweden (1961) states:

Extradition shall not be granted:

1. When the offense is purely military.

2. If the offense is regarded by the requested States as a political offense or as an offense connected with a political offense.

The treaty with Uruguay (1905) states that:

A person whose surrender has been granted shall not in any case be either prosecuted or punished for any political crime or act connected therewith, committed previous to the extradition.

It should be noted that military, fiscal and economic offenses are not usually part of the meaning of the political offense in American treaties. The general rule is not to consider them extraditable offenses unless, of course, they are listed in the treaty as an extraditable offense, which is almost never the case. This, of course, raises serious questions in relations with Socialist nations where economic, fiscal and military crimes may be as seriously punishable as offenses against the person, if not more.

Having thus stated the technical language of the definitional problem, which has revealed only one thing—that no definition is provided, the most revealing study of its intended content and meaning appears in the political relationship between the United States and the other countries of the world with which it has other treaties. The cumulative treaties chart in *Appendix B* shows all the treaties which exist between the United States and those countries with which it has extradition treaties (including the political offense exception clause). The closer the countries are ideologically, the more bound they are by a variety of treaty relations and the more likely it is that their mutual interests will be in the respective maintenance of their political values and systems.



## APPENDIX B

COUNTRY	CITE	DATE	ARTICLE
ALBANIA	49 Stat. 3313	Nov. 14, 1933	3
- ARGENTINA	31 Stat. 1883	Jul. 2, 1900	3
AUSTRIA*	49 Stat. 2710	Sep. 5, 1934	3
BELGIUM*	15 UST 2252	Dec. 25, 1964	4
BOLIVIA	32 Stat. 1857	Jun. 22, 1902	6
BRAZIL****	15 UST 2093	Dec. 17, 1964	5
BULGARIA	43 Stat. 1886	Jun. 24, 1924	3
CANADA*	8 Stat. 572	Aug. 9, 1842	3
CHILE	32 Stat. 1850	Jun. 26, 1902	4
COLUMBIA	26 Stat. 1534	Jan. 11, 1891	5
COSTA RICA	43 Stat. 1621	Apr. 27, 1923	3
CUBA**	33 Stat. 2265	Mar. 2, 1905	6
CZECHOSLOVAKIA*	44 Stat. 2367	Mar. 29, 1926	3
DENMARK*	32 Stat. 1906	Mar. 16, 1902	6
DOMINICAN REPUBLIC	36 Stat. 2468	Aug. 2, 1910	3
ECUADOR*	18 Stat. 756	Nov. 12, 1873	3
EL SALVADOR	37 Stat. 1516	Jul. 10, 1911	3
ESTONIA*	43 Stat. 1849	Nov. 15, 1924	3
FINLAND*	44 Stat. 2002	Mar. 23, 1925	3
FRANCE*	37 Stat. 1526	Jul. 27, 1911	6
GERMANY	47 Stat. 1862	Apr. 26, 1931	4
GREAT BRITAIN***	47 Stat. 2122	Aug. 4, 1932	6
GREECE*	47 Stat. 2185	Nov. 1, 1932	3
GUATEMALA*	33 Stat. 2147	Aug. 15, 1903	4
HAITI	34 Stat. 2858	Jun. 28, 1905	7
HONDURAS*	37 Stat. 1616	Jul. 10, 1912	3
HUNGARY	11 Stat. 691	Dec. 13, 1856	3
IRAQ	49 Stat. 3380	Apr. 23, 1936	3
IRELAND* ***	26 Stat. 1508	Mar. 11, 1890	2
ISRAEL	14 UST 1707	Dec. 5, 1963	6
ITALY*	15 Stat. 629	Sep. 17, 1868	3
JAPAN*	24 Stat. 1015	Nov. 26, 1886	4
LATVIA*	43 Stat. 1738	Mar. 1, 1924	3
LIBERIA	54 Stat. 1733	Nov. 21, 1939	3
LIECHTENSTEIN	50 Stat. 1337	Jun. 28, 1937	3
LITHUANIA*	43 Stat. 1835	Aug. 23, 1924	3
LUXEMBOURG*	23 Stat. 808	Aug. 13, 1884	3
MEXICO*	31 Stat. 1818	Aug. 22, 1899	3
MONACO	54 Stat. 1780	Feb. 28, 1940	4
NETHERLANDS* ***	26 Stat. 1981	Jul. 11, 1889	3
NICARAGUA	35 Stat. 1869	Jul. 14, 1907	3
NORWAY*	28 Stat. 1187	Dec. 8, 1893	6
PANAMA	34 Stat. 2851	May 8, 1905	6
PARAGUAY	38 Stat. 1754	Jan. 17, 1914	3
PERU	32 Stat. 1921	Jan. 23, 1901	6
POLAND*	46 Stat. 2282	Jun. 6, 1929	3
PORTUGAL	35 Stat. 2071	Nov. 14, 1908	3

COUNTRY	CITE	DATE	ARTICLE
RUMANIA	44 Stat. 2020	Apr. 7, 1925	3
SAN MARINO*	35 Stat. 1971	Jul. 3, 1908	3
SOUTH AFRICA	2 UST 884	Apr. 30, 1951	6
SPAIN	35 Stat. 1947	Apr. 6, 1908	3
SWEDEN****	14 UST 1845	Oct. 24, 1961	9
SWITZERLAND*	31 Stat. 1928	Mar. 29, 1901	7
THAILAND	43 Stat. 1749	Mar. 24, 1924	3
TURKEY	49 Stat. 2692	Aug. 18, 1934	3
UNITED ARAB REPUBLIC	19 Stat. 572	Apr. 25, 1875	3
URUGUAY	35 Stat. 2028	Jun. 4, 1908	3
VENEZUELA	43 Stat. 1698	Apr. 14, 1923	3
YUGOSLAVIA	32 Stat. 1890	Jun. 12, 1902	6

The following countries have adopted and ratified in full the treaty with the United Kingdom (47 Stat. 2122): Australia, Burma, Ceylon, Cyprus, Ghana, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Nigeria, Pakistan, Sierra Leone, Singapore, Tanzania, Trinidad & Tobago and Zambia.

Canada and New Zealand have the same treaty as Ireland (26 Stat. 1508) and Indonesia adopted and ratified the Netherlands Treaty (26 Stat. 1481).

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\*Supplementary Treaty signed at a later date.

\*\*Protocol signed at a later date.

\*\*\*Additional countries covered by Treaty.

\*\*\*\*Political Exception Clause with Reservations.

# APPENDIX C

Agric. Commodities  
 Amity  
 Atomic Energy  
 Aviation  
 Boundaries  
 Canal Rights  
 Claims  
 Counsels  
 Copyrights  
 Cultural Relations  
 Customs  
 Defense  
 Drugs  
 Economic & Tech. Coop.  
 Education  
 Extradition  
 Finance  
 Fisheries  
 Insular Possessions  
 Lend Lease  
 Maritime Matters  
 Meteorological Research  
 Military Cemeteries  
 Mutual Security  
 Narcotic Drugs  
 Occupied Territory  
 Outer Space  
 Pacific Settlement  
 Patents  
 Peace Treaties  
 Postal Matters  
 Property  
 Publications  
 Satellites  
 Smuggling  
 Taxation  
 Telecommunications  
 Tracking Stations  
 Trade and Commerce  
 Trademarks  
 Visas  
 Weather Stations  
 Peace Corps  
 Investment Guarantees  
 Military Affairs  
 General Relations  
 Information Media  
 Relief Supply and Pack  
 Nationality  
 Inland Navigation  
 Aerospace Sampling  
 Mapping  
 Strategic Matters  
 Health and Sanitation  
 Highways  
 Labor  
 Extraterritory  
 Judicial Procedure  
 Atmospheric Disturbance

Albania  
 Argentina  
 Australia  
 Austria  
 Belgium  
 Bolivia  
 Brazil  
 Bulgaria  
 Burma  
 Canada  
 Ceylon  
 Chile  
 Colombia  
 Congo (Brzvl)  
 Costa Rica  
 Cuba  
 Cyprus  
 Czechoslovakia  
 Denmark  
 Dominican Rep.  
 Ecuador





Agric. Commodities  
 Amity  
 Atomic Energy  
 Aviation  
 Boundaries  
 Canal Rights  
 Claims  
 Counsels  
 Copyrights  
 Cultural Relations  
 Customs  
 Defense  
 Drugs  
 Economic & Tech. Coop.  
 Education  
 Extradition  
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 Fisheries  
 Insular Possessions  
 Lend Lease  
 Maritime Matters  
 Meteorological Research  
 Military Cemeteries  
 Mutual Security  
 Narcotic Drugs  
 Occupied Territory  
 Outer Space  
 Pacific Settlement  
 Patents  
 Peace Treaties  
 Postal Matters  
 Property  
 Publications  
 Satellites  
 Smuggling  
 Taxation  
 Telecommunications  
 Tracking Stations  
 Trade and Commerce  
 Trademarks  
 Visas  
 Weather Stations  
 Peace Corps  
 Investment Guarantees  
 Military Affairs  
 General Relations  
 Information Media  
 Relief Supply and Pack  
 Nationality  
 Inland Navigation  
 Aerospace Sampling  
 Mapping  
 Strategic Matters  
 Health and Sanitation  
 Highways  
 Labor  
 Extraterritory  
 Judicial Procedure  
 Atmospheric Disturbance

Poland  
 Portugal  
 Romania  
 San Marino  
 Sierra Leone  
 Singapore  
 South Africa  
 Spain  
 Sweden  
 Switzerland  
 Tanzania  
 Thailand  
 Trinidad and Tobago  
 Turkey  
 United Arab Repblic.  
 Un. Kingdom  
 Uruguay  
 Venezuela  
 Yugoslavia  
 Zambia

